(24,535)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 791.

THE TEXAS & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

M. J. MURPHY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 1, 1915.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on the First Monday in November, A. D. 1914, at Fort Worth, Texas.

Before the Honorable Don A. Pardee and the Honorable Richard W. Walker, Circuit Judges, and the Honorable Rhydon M. Call, District Judge.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
versus
M. J. MURPHY, Defendant in Error.

Be it remembered, that heretofore, to-wit, on the 17th day of April, A. D. 1914, a transcript of the record of the above styled cause, pursuant to a writ of error to the District Court of the United States for the Eastern District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2639, as follows:

CAPTION

Be it remembered that at a term of the United States District Court in and for the Eastern District of Texas, holding sessions at Jefferson, Texas, at its October Term, A. D. 1913, and on the 11th day of October, 1913, in Cause No. 596, wherein M. J. Murphy was plaintiff, and the Texas & Pacific Railway Company was defendant, a judgment was rendreed in favor of M. J. Murphy, the plaintiff, and against the Texas & Pacific Railway Company, for the sum of Twelve Thousand ($12,000.00) Dollars.

The following proceedings were had, to-wit:

TRANSCRIPT OF RECORD

United States
Circuit Court of Appeals
FIFTH CIRCUIT

AMENDED PETITION OF THE PLAINTIFF.

M. J. MURPHY

vs.

TEXAS & PACIFIC RAILWAY COMPANY.

TO THE HON. J. GORDON RUSSELL, JUDGE OF SAID COURT:

Now comes the plaintiff, leave of Court first being had and obtained, and files this his first amended original peti-

tion amending his amended original petition so that the same shall hereafter read as follows, to-wit:

Your petitioner, M. J. Murphy, who will be styled plaintiff herein, complaining of the Texas & Pacific Railway Company, which will be styled defendant herein, represents and shows that the plaintiff resides in Marshall, Harrison County, Texas, and that the defendant is a body politic duly incorporated and is engaged in the business of a common carrier over its railroad in and through Harrison County, Texas, and has a local agent in Marshall, Harrison County, Texas, upon whom process may be served in this suit.

I. The plaintiff shows that on or about the 1st day of September, 1912, the defendant Railway Company had, owned and operated a line of Railway from El Paso, Texas, to New Orleans, Louisiana; and at Marshall, Texas, the said Railway Company, in connection therewith, owned and operated a large yard in which many freight, refrigerating and passenger cars were switched and handled in breaking up the trains that came into Marshall, and making up the trains that went out from Marshall, over the said line of Railway; and in such work had in its employ certain switch crews and train operatives, and that on or about the said date the plaintiff was in the employ of the said Railway Company in the yard at Marshall, Texas, as a Railway switchman.

II. The plaintiff shows that on to-wit, the night of the 2nd of September, 1912, while in the employ of the defendant Railway Company as above set out, and while engaged in the work for which he was employed, it became necessary for the plaintiff to be upon the top of one of the cars that was being switched in said yard in Marshall, Texas, and which was commonly known as a refrigerating car for the purpose of setting brakes and discharging other duties thereon; and that the plaintiff was caused to fall from the top of said car to the ground on account of the negligence of the defendant Railway Company in that the Railway Company had left the ventilating door and other coverings of

the ice box or ventilator hole in the roof of the car open, and had not protected the same with any covering of any kind or character; and that the plaintiff in passing along and over the top of the said car in the discharge of his work stepped upon the sharp edge or flange that surrounded the said opening in the top of said car, and which was left exposed by reason of the door thereof not being closed, or over the same, and that when the plaintiff thus stepped upon said sharp protruding edge or into said opening it caused his foot to turn or slip into the opening which unbalanced the plaintiff and caused him to lose his balance and slip and fall from the top of the said car to the ground, a distance of some fourteen or fifteen feet; and that the plaintiff struck the ground or other hard substance with his feet, legs and back and thereby received injuries that have permanently crippled and disabled him.

III. The plaintiff shows that the defendant Railway Company was negligent and that said negligence was the cause of the plaintiff's injury in this:

That is was the duty of the defendant Railway Company to furnish the plaintiff with proper instrumentalities and appliances with which to discharge his duties; and that it was the duty of the defendant Railway Company to furnish the plaintiff a reasonably safe place in which to perform his work and not expose him to unnecessary hazards and dangers; that the defendant Railway Company failed to discharge its said duty to the plaintiff in that the said Railway Company should not have left the said opening in the top of the said car open and should not have permitted the said protruding edge or flange around the opening to remain uncovered or unprotected, and that by reason of the said negligence of the said Railway Company in leaving or permitting the said door to be left open and in leaving the said flange or protruding edge around the said opening uncovered, and in permitting the said opening to be left uncovered, the said Railway Company was guilty of negligence, which negligence was the direct and proximate cause of the injuries to the plaintiff as herein more fully set out.

IV. The plaintiff further shows that the inside of the door or covering for the said ventilator or opening had become mouldy and sleek and that the said door or covering being thrown entirely back on the car left the said inside of the door or covering exposed and that when the plaintiff stepped upon the said flange of the said opening that he stepped with the other foot upon the said upturned door, and that by reason of the condition of the door and by reason of his foot striking the said flange and turning, that the plaintiff was thrown and fell from the said car and inflicted upon him the said injuries herein sued for.

V. The plaintiff shows that when he fell or was thrown from the said car that it inflicted upon him great and severe injuries to his feet, legs, hips, arms, hands, body and back, and has caused severe and permanent injuries to his feet, legs, hips and back, from which the plaintiff will never recover, and that plaintiff has, by reason of said injuries, suffered great mental and physical pain; and by reason thereof will continue to suffer great mental and physical pain so long as he may live.

VI. The plaintiff shows that at the time of the said injury he was about forty years of age, strong, healthy and able to do much manual labor, and was earning and could earn by his labor the sum of to-wit, one hundred and forty ($140.00) dollars per month, or a total of about one thousand six hundred and eighty ($1680.00) dollars per year; and that by reason of the said injuries the plaintiff has not been able to earn any money whatever since, and that the plaintiff will never be able to earn any money in the future, that his earning capacity has been or if he shall be able to earn any money in the future, that his earning capacity has been greatly diminished by reason of the said injuries; that by reason of the said injuries the plaintiff has been damaged in time lost, time he will lose in the future, decreased ability to earn money in the future, mental and physical pain already endured and mental and physical pain

that he will endure in the future, in the sum of to-wit, fifty thousand dollars actual damages.

VII. Wherefore the premises considered, the plaintiff prays that upon final hearing the plaintiff have judgment against the defendant for Fifty Thousand Dollars actual damages, all costs of suit and for general relief.

S. P. JONES & BIBB & SCOTT,
Attorneys for Plaintiff.

I, M. J. Murphy, plaintiff in the above named cause, solemnly swear that the facts and statements contained in the foregoing petition are true according to my knowledge and belief.

.....

Subscribed and sworn to before me on this ..... day of ..... 1913.

.....

Notary Public in and for Harrison County, Texas.

Endorsed. D. L. No ....., in the District Court of the United States for the Eastern District of Texas at Jefferson, Texas, M. J. Murphy vs. Texas & Pacific Railway Company. Plaintiff's First Amended Original Petition. Filed Oct. 9, 1913. J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

A copy of the original I certify.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

THE AMENDED ANSWER OF THE DEFENDANT.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, AT JEFFERSON.

M. J. MURPHY

vs.

TEXAS & PACIFIC RAILWAY COMPANY.

Now comes the defendant and amends its answer and says:

1.

Now comes the Texas & Pacific Railway Company and demurs to plaintiff's petition and says the same shows no cause of action.

2.

And for answer defendant denies each and every allegation in plaintiff's petition and says it is not guilty of the wrongs charged against it.

3.

Defendant says that the plaintiff, Murphy, was employed by the defendant Railway Company as a switchman working in the railroad yard at Marshall, and that his duty required him to work at night, that during the night he was injured, he was called on to place some cars on the track known as the City track or team track, which is a track where car loads of freight are placed to be unloaded and hauled away by teams and wagons. That before Murphy placed these cars on the team track, there was a car there known as a refrigerator car with bananas on it, and which had been placed on said track several days before Murphy was injured to be unloaded and taked away by teams and wagons. That said refrigerator car had compartments in it for the purpose of hauling the fruit, or whatever is being conveyed, and the said car had in each end other compartments used for storing ice to preserve the fruit or whatever

is being conveyed. That this ice is placed in these compartments through an opening in the top of the car called the hatches. These openings are furnished with a door that they may be opened or closed at will.

That this car of bananas was shipped from Galveston and had a custodian in charge of the fruit, by the name of M. M. Marshall, and on the night plaintiff was injured, Marshall was sleeping in the car and had the hatches open for the purpose of properly ventilating the car and preserving the bananas. That Murphy rode on top of the box car that was placed in there that night, as it was his duty, and set the brakes on the cars that were placed in there by him, and then walked from these box cars on eastward and on to the car loaded with bananas, and in attempting to get down from said car in some way unknown to the defendant, he fell from said car and was injured. That plaintiff's duty did not call him to get on to the banana car at all and that if he did so, it was for his own convenience and pleasure and not in furtherance of his duty to defendant. Defendant says that Murphy had a lamp, well trimmed and burning which gave ample light for him to have seen that the ice hatches were open if he had been attending to his duty.

4.

Defendant says that it had in force on its road, standard rules, regulating the transportation of fruit and vegetables and other perishable freight, and said rules especially regulated the transportation of bananas and made it the right and duty of the man in charge of said fruit to open and close the hatches or ventilators whenever he desired to do so, and made it the duty of the employes of the Railroad Company to assist the man in charge of said bananas to carry out his desire and instructions with reference to keeping said ventilators open. That if said ventilators were open on the night when Murphy was injured, that they had been opened by Mr. Marshall, the man in charge of said bananas, as he had a right to do under the established rules regulating the transportation of said fruit, which were promulgat-

ed and published in accordance with the orders of the Railroad Commission.

That these rules and regulations were reasonable and proper and especially proper in this case of bananas, which fruit is more liable to be injured by heat or cold than any other fruits.

That the plaintiff was fully aware of these regulations and should have governed himself in accordance with the same. That said car was placed on the side track several days before the injury and was not then in the regular service of the company and the company had no right to interfere with it through its employes or otherwise, without notifying Mr. Marshall, the man in charge, of their desire and intention to do so.

Wherefore the defendant was not guilty of any negligence, but the plaintiff was guilty of negligence in going on the banana car and in stepping on the side of the open hatch when he had a lantern in his hand.

Wherefore the plaintiff can not recover.

F. H. PRENDERGAST,
YOUNG & STINCHCOMB,
Attorneys for Defendant.

Endorsed. D. L. No. 596. Murphy vs. Texas & Pacific Railway Co. Amended Answer. Filed Oct. 9, 1913 .
J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.
A copy of the original I certify.

J. R. BLADES, Clerk.
By W. E. SINGLETON, JR., Deputy.

THE JUDGMENT OF THE COURT.

M. J. MURPHY

D. L. 596. vs.

THE TEXAS & PACIFIC RAILWAY COMPANY.

On this the 9th day of October, 1913, came on for trial the above cause and the parties, plaintiff and defendant, appeared by their respective attorneys and announced ready for trial and thereupon came a jury of good and lawful men, to-wit, Thos. W. Taylor, foreman, and eleven others who were duly empaneled and sworn to try said cause and the said cause cantinued from day to day until the 11th day of October, 1913, when the jury having received the charge of the Court and having duly considered of their verdict returned into open Court the following verdict: "We, the jury,, find for the plaintiff and assess his damages at Twelve Thousand ($12,000.00) and no-100 dollars.

"THOS. W. TAYLOR, Foreman."

It is therefore adjudged, decided and decreed that the plaintiff, M. J. Murphy, do have and recover of and from the defendant the Texas & Pacific Railway Company the sum of Twelve Thousand Dollars and that said judgment bear interest from this date at six per cent per annum. Further ordered that plaintiff for the use and benefit of the officers of Court recover all costs of this suit for all of which let execution issue.

GORDON RUSSELL, Judge.

Endorsed. D. L. No. 596, M. J. Murphy vs. Texas & Pacific Railway Company. Judgment. Filed Oct. 11, 1913.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

A copy of the original I certify.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

THE APPEAL BOND.

M. J. MURPHY

No. 596. vs.

THE TEXAS & PACIFIC RAILWAY COMPANY.

KNOW ALL MEN BY THESE PRESENTS, that we, THE TEXAS & PACIFIC RAILWAY COMPANY, a corporation duly incorporated and organized under and by virtue of an Act of Congress of the United States, as principal, and J. H. Ardrey and E. R. Buddy, as sureties are held and firmly bound unto M. J. Murphy in the sum of Eighteen Thousand Dollars to be paid to the said M. J. Murphy, his executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents, sealed with our seals, using scrolls for seals, and signed with our names, this the .... day of January, 1914.

The condition of the foregoing bond is such, that, whereas lately at a term of the District Court of the United States for the Eastern District of Texas at Jefferson in a suit pending in said Court between M. J. Murphy as plaintiff and the TEXAS & PACIFIC RAILWAY COMPANY defendant, numbered 596 on the docket of said Court, a judgment was rendered on the 11th day of October, 1913, that the plaintiff M. J. Murphy should have and recover of the defendant the sum of Twelve Thousand Dollars with six per cent per annum thereon from date of rendition, as well as all costs of suit; and,

Whereas, said THE TEXAS & PACIFIC RAILWAY COMPANY has obtained a writ of error, and ha s filed a copy thereof in the office of the clerk of said Court to reverse said judgment, and also a citation directed to said M. J. Murphy and his attorney of record, S .P. Jones, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Fifth Circuit to be holden

at New Orleans, Louisiana, within thirty days from the date thereof.

Now if the said THE TEXAS & PACIFIC RAILWAY COMPANY shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

THE TEXAS & PACIFIC RAILWAY CO. (Seal)
By F. H. PRENDERGAST, Attorney.
J. H. ARDREY. (Seal)
E. R. BUDDY. (Seal)

Approved: GORDON RUSSELL, Judge.

Endorsed. No. 596. M. J. Murphy vs. THE TEXAS & PACIFIC RAILWAY COMPANY, in the United States District Court for the Eastern District of Texas, at Jefferson.

WRIT OF ERROR BOND.

Filed 20th day of February, 1914.

J. R. BLADES, Clerk.
By W. E. SINGLETON, JR., Deputy.

A copy of the original I certify.

J. R. BLADES, Clerk.
By W. E. SINGLETON, JR., Deputy.

THE ASSIGNMENT OF ERRORS.

M. J. MURPHY
vs.
TEXAS & PACIFIC RAILWAY COMPANY.
No. 596.
IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, AT JEFFERSON.

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth District:

GREETING:

Because in the record and in the proceedings had in the

District Court in the above entitled cause, there has been error committed to the damage of the defendant, the Texas & Pacific Railway Company, as shown by the following assignment of errors.

1.

The Court erred in refusing special charge No. 1 requested by the defendant, which charge is as follows:

"There is no evidence in this case showing any want of ordinary care on the part of the Railway Company that caused plaintiff to fall, you will therefore return a verdict for defendant" .

2.

The Court erred in refusing special charge No. 2 requested by the defendant, which charge is as follows:

"If the plaintiff with his lantern on top of the car could have seen the hole in the top of the car was open by the exercise of ordinary care for his own safety, then he can not recover because his own want of care caused his injury."

3.

The Court erred in refusing special charge No. 3 requested by the defendant, which charge is as follows:

"The Jury are charged:

That the car from which the plaintiff fell was in charge of the man, Marshall, who had bananas in it that had been shipped over the railroad and it appears that the holes in the top of the car were opened and left open by the man in charge of the bananas or by his authority, and were not opened by any person in the employ of the Railroad Company.

Therefore defendant would not be liable and you will find for the defendant.

4.

The Court erred in refusing special charge No. 4 requested by the defendant, which charge is as follows:

"It appears that plaintiff was caused to fall from the top of a box car called a refrigerator car by reason of the

fact that holes in the top of the car were left open . The holes being used to put ice in the car. Now if the holes were opened and left open by some one not in the employ of the Railway Company, and without any direction from the Railway Company to do so, then the Railway Company would not be liable."

5.

The Court erred in refusing special charge No. 5 requested by the defendant, which charge is as follows:

"It appears from the evidence that the car of bananas was in control of the man, Marshall, at the time plaintiff was injured. Therefore the Railway Company is not responsible for the holes on top being left open, you will therefore find for the defendant."

6.

The Court erred in refusing special charge No. 6 requested by the defendant, which charge is as follows:

"It appears that plaintiff knew the car of bananas was on the City track, called the team track to be unloaded, which knowledge informed him that it was not in the regular service of the Railway Company, and he was therefore informed that the man with the bananas had charge of the car, with authority to open and close the holes on top of the car, to put ice in and to regulate the temperature of the car."

7.

The Court erred in refusing special charge No. 7 requested by the defendant, which charge is as follows :

"The Jury are charged:

That it has been proven in this case, that the car from which the plaintiff fell was a refrigerator car containing bananas, and said car was in charge of a messenger or custodian named Marshall. That under the rules of the Railway Company governing the transportation of bananas, the messenger in charge of the car had the right to open the ventilators on top of the car when he decided to do so.

Wherefore the fact that the ventilator was open when

Murphy fell can not be held to be negligence on the part of the Railway Company.

8.

The Court erred in refusing special charge No. 8 requested by the defendant, which charge is as follows :

"The Jury are charged:

That if Murphy did not get on the banana car to set the brakes on same, but got on it for some other purpose of his own, then it would not be negligence as to him, for the ventilators to be left open. And plaintiff can not recover on the ground that it was negligence in the Railway Company to leave the ventilators open."

9.

The Court erred in refusing special charge No. 9 requested by the defendant, which charge is as follows:

"The Jury are charged:

The rules of the Railway Company governing the transportation of bananas in refrigerator cars are reasonable and binding on the parties; and if the car in question was handled in accordance with these rules, and if the messenger in charge of the car opened and left open the ventilators on the car ,and if the ventilators being open caused the plaintiff to fall, then plaintiff can not recover.

10.

The Court erred in refusing special charge No. 10 requested by the defendant, which charge is as follows:

"In this case the construction of the car from which plaintiff fell, and the construction of the openings in the top of the car have been shown to you without any contradiction, and that the brake wheel was at the west end of the car, and it appears that when Murphy got on the banana car he went about four or five feet east of the west end of the car.

Now the evidence shows that there was no need for him to have gone that far east on the car to have set the brake on the car.

11.

The Court erred in refusing special charge No. 11 requested by the defendant, as follows

"The Jury are charged:

You are instructed that the plaintiff in his petition does not allege that he did not know that the ventilator door was open before he stepped on the ventilator door or casing, and you are therefore charged that you must consider that he knew that the door was open before he made the step, and if you find that he had known that the door was open and laid back, he could have, by the exercise of ordinary care, avoided falling and being injured, you will find for the defendant.

12.

The Court erred in refusing special charge No. 12 requested by the defendant, which charge is as follows:

"The Jury are charged:

You are instructed that the undisputed evidence is that at the time the plaintiff was injured the defendant had adopted rules pertaining to refrigerator cars on its lines, and that said rules provided that the ventilation of all such cars should be under the direction and control of any messengers that might be in charge of them, and that the opening of the ventilator doors should be under the control of the messengers, and now you are charged that if you believe from the evidence that the said rules were reasonable for the operation of ventilator cars over the defendant's lines, you will find for the defendants."

13.

The Court erred in refusing special charge No. 13 requested by the defendant, which charge is as follows :

"The Jury are charged:

If you find from the evidence that the plaintiff knew before he stepped on the door or casing of the ventilator that the ventilator door was open, you will find for the defendant.

14.

The Court erred in refusing special charge No. 14, requested by the defendant, which charge is as follows:

"The Jury are charged:

"If you find from the evidence that the plaintiff stepped on the ventilator door or casing, and slipped and fell, but you further find that the plaintiff knew that the ventilator was open and the door laid back before he stepped on the ventilator door or casing, and that after so knowing the plaintiff could have by the exercise of ordinary care avoided falling from the car and being injured, you will find for defendant, whether the ventilator door was open by the defendant's negligence or not, because the ventilator door being thus open under the circumstances would not be the proximate cause of the injury.

15.

The Court erred in refusing special charge No. 15, requested by the defendant, which charge is as follows:

The Jury are charged:

"The defendant had a right to presume that the plaintiff would exercise ordinary care for his safety while doing his work, and it was not necessary for the defendant, or any of its agents to contemplate that the plaintiff would be guilty of a want of care and become injured as a result thereof, and the defendant had a right to presume that the plaintiff would take such notice of the construction of cars operated on its lines as would be taken by a person of ordinary care and caution under the same circumstances, and it would take such notice of the manner in which the cars on its line were used.

"Now, if you find from the evidence that it was a business of the defendant to operate refrigerator cars over its line, and that it also made the business of allowing messengers to accompany such cars at times, and that the messengers had full control of the use of the ventilator doors,

and that the employes of the defendant had knowledge or information that the messengers had charge of the use of these ventilator doors, the defendant would have a right to presume that the plaintiff and other employes of his class would take notice of the construction of such refrigerator cars and the use of the ventilator doors, and take notice that the doors might be open and laid back, if they should be open and laid back, and of you so find, you will return a verdict for the defendant."

16.

The Court erred in refusing special charge No. 16, requested by the defendant, which charge is as follows:

"If you find from the evidence that the plaintiff knew that it was the rule or practice of the defendant company to allow messengers in charge of refrigerator cars to exercise control over the manner in which the ventilator doors were left open, it would then be the duty of the plaintiff to look out for wide open doors on refrigerator cars situated as this one was, and if you so find you will return a verdict for the defendant."

17.

The Court erred in refusing special charge No. 17, requested by the defendant, which charge is as follows:

"If you find from the evidence that the plaintiff stepped on the ventilator door and casing, but that before he stepped on them, he knew that the said door was open and laid back, and knew the dangers arising therefrom, or that, in the exercise of ordinary care for his own safety, he must necessarily have known that the said door was open and laid back, and must necessarily have known the dangers arising therefrom, you will find for the defendant."

18.

The Court erred in charging the Jury as follows:

"It has been asserted in the pleadings and made an issue in the evidence that the refrigerator car in question was in the control and possession of a man named Marshall and that this man left the opening uncovered and that the de-

fendant Company knew nothing of Marshall's failure to cover the opening and therefore is not responsible for Marshall's act in leaving it uncovered. Upon this phase of the case you are instructed that the defendant Railroad Company under the law can not escape liability for injuring the plaintiff by virtue of Marshall's act in leaving the opening above the bunker uncovered. In other words though Marshall may have been the man who left the bunker uncovered the mere fact that Marshall or some one acting for him left it uncovered would not be sufficient to defeat a recovery by the plaintiff, but while this is true the Jury can look to the fact of Marshall's control of the car in determining whether the defendant Company on the occasion in question was guilty of negligence which directly and proximately contributed to the injury of the plaintiff, and you may also look to the fact of Marshall's control of the car as well as the other facts in evidence in determining whether the plaintiff was guilty of contributory negligence in walking along the car in the manner he did and at the time of the injury."

19.

The Court in charging the Jury as follows after charging that if the plaintiff stepped on the casing of the ice box and fell, "And you further find from a preponderance of the evidence that the cover of the ice bunker on the casing of which plaintiff stepped was thrown back so as to leave the ice bunker open and in such a condition that the plaintiff might step upon said casing and if you further find from a preponderance of the evidence that the leaving of the covering of the ice bunker in the condition it was was a failure on the part of the defendant to exercise that degree of care which a person of ordinary prudence would have exercised under the same or similar circumstances and was therefore negligence." And was the proximate cause of the injury to find for the plaintiff.

This was error because the facts of the case would not support a finding that the Railway Company was negligent in leaving the cover off the ice box.

Wherefore it prays for a writ of error and the amount of supercedaes bond be fixed.

F. H. PRENDERGAST,
Attorney for Texas & Pacific Railway Co.

Writ of error allowed and supercedeas bond is fixed at $18,000.00. GORDON RUSSELL,
Judge.

Endorsed. D. L. No. 596. M. J. Murphy vs. Texas & Pacific Railway Co. Assignment of Errors. Filed February 19, 1914. J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.
A copy of the original I certify.

J. R. BLADES, Clerk.
By W. E. SINGLETON, JR., Deputy.

BILL OF EXCEPTIONS.

ON THE TRIAL of the above entitled and numbered cause in the District Court of the United States for the Eastern District of Texas, at Jefferson, on October 9, 10 and 11, 1913, the following evidence was introduced, proceedings had and exceptions reserved, to-wit:

M. J. MURPHY, PLAINTIFF, TESTIFIED:

Live at Marshall, Texas; will be 45 years of age next month. I once worked for the defendant as a switchman in the yards at Marshall, Texas. At the time I was injured there were three switch engines and crews worked in the yards in the day time and one at night. I worked with the night engine. The Marshall yard would be called a small yard in comparison with the larger yards over the country. On the night of September 2, 1912, I was injured while working for the defendant as a switchman in the Marshall yards. Was hurt about four or five o'clock in the morning, and it was dark. Just before I was hurt had been switching cars in the yards. There is one man following the engine, the foreman of the engine and two field men, and the field men ride the cars, go on top and ride them as far as the foreman wants them to go, and when they reach the place where he wants to stop them we set the brakes. I was a field man. The foreman has charge of the crew and directs the work to be done. He tells the switchmen what to do and where to place the cars. The foreman on this occasion was Harry Hill. The man that follows the engine goes with it and couples it to cars and cuts them off and throws the switches. Some months I would earn $136.00 and some months $138.00, but my average wages were about $130.00 per month. The track where I fell and was injured was called the City Track. In going up and down cars and setting brakes and doing the work required of him, a switchman has to move rapidly. It was hard work I was doing there and required quick movement all the time. I fell from a car on the City Track and that is one of the

tracks my duties required me to work on. Some nights we would have to go on that track four or five times. On the night I was hurt we came up off the lead track, I forgot whether No. 10 or No. 6, with a car. The track running diagonally on the map which you exhibit to me is called the lead track. The track running east and west into the lead is No. 10 track. I came in on the lead track off one of the numbered tracks and then up the lead track with one car and the engine, and then when we got up the lead track we passed on the main line still going west, and then passed the City Track switch. The last track running out from the main line is the one to the right looking east. When we got off the lead track I was on top of the car that the engine had hold of. When we passed the switch that leads into the City Track the switch was thrown, and when we got up here the foreman told me to go in on the City Track with the car, and couple up all cars west of the crossing. The switch was thrown for the City Track after I passed it. Then we backed in; the engine was headed that way. The man following the engine cut the car off, and I holloaed and said "Bob, Harry wants us to couple up to the cars west of the crossing. You cut the car off and give it a kick into the City Track." When he holloaed to him he said "all right," and came back in with the engine. When he came back in with the engine he coupled to that car. There were two other openings west of this car and two couplings had to be made. We coupled to the car at the point marked A. We coupled to those cars and I walked back to let the brakes off. They coupled into the first car. After he made the coupling I walked over on the next car, and I looked to see whether the brake was set or not. They are generally set there because the cars will roll out if they are not. He continued to back on then and made another coupling, and then I went on to the next car and looked at the brake. If it is set there we have to let it off so we can shove in there. After we coupled to that car I got over on to the car marked A—that is, the third coupling. He coupled into car A, the third car, and I got over on that car. It is down hill there

back towards the main line, and when we put cars in there we have to set brakes on them to keep them from rolling on the main line. Before I got off the car next to car A, I set a binder or brake on that car and got off on car A. I got on car A to see whether the brake was set on that car. We had to have brakes set on cars next to the crossing, and when you go three or four car lengths it is level, but for three car lengths west of the crosing cars will roll out on the main line if the brakes are not set or a chunk put under the wheels. A good many of the brakes were defective and for that reason would not hold and we had to put chunks under the wheels. I got on car A for the purpose of seeing whether the brakes on that car were set. My object was to go to the brake on the car and then down off the car. When I left the running board of the car, which is in the middle of the top of the car, I went to step over to the brake which would be a northwest course, to see whether it was set or not on my way down off the car, which was the customary thing to do. If I got to the brake and found it was not set, I intended to set it. I was going to test the brake and if necessary set it. When I went to make the step from the running board of car A, I stepped with my right foot from the running board first, and when I made a step with my left foot I got it on the casing that goes around the ice box, the casing being about two inches wide, and about two inches above the top of the car, my foot started to turn. I had a brake club in my hand and was standing straight up. I made an effort to catch myself when my foot started to turn on the casing, and my foot went from under me and I went down from the roof of the car facing north. When I started down I struck the roof of the car with my back, and when I did that it doubled me up, and instead of falling straight down, went out slanting. Instead of falling straight down, it turned me. To the best of my recollection I struck on my feet first, and I was in a kind of shooting position. I could not say what I fell on. I know I struck something, but whether it was a rock or what it was I could not say. They told me I struck the crossing plank. The

end of the crossing plank was sticking up exposed two or three inches. It was a refrigerator car from which I fell, and the top of it was 11 or 12 feet from the ground. I would suppose 12 feet would be the average height of that kind of car. I received two badly bruised and strained feet from the fall, and I got my wrist under me when I fell, I could not tell how and it was hurt, and I had an injury between my right hip and spine on the right side, and the muscles in the left side of my back were sprained. I didn't get up from where I fell because I could not. I was carried away from the place where I fell. The hospital ambulance came down there and carried me to the hospital. I stayed at the hospital about two weeks and was in bed while there. During that time the condition of my feet, legs and back was very bad. I could not walk or move about; they carried me out of the hospital, and my father-in-law took me home in a buggy. When they got me home they put me in bed. I was then confined to the house until the time I walked on crutches. It was about seven weeks from the time I was hurt before I could get around a little on crutches. Up to this time I have been confined to the house all the time except when I would go to the doctor's office. I can not tell that my feet are improving any. My back aches nearly all the time. I suffered about as much pain as I thought I could suffer after I was hurt; I suffered pretty bad. That suffering has kept up ever since I was hurt, and is present at this time. I was a big, husky man in good health before I was hurt. I was a laboring man and had been railroading about 24 years. I was able to do the work of a railroad man. I am not able to do any work at all now, and have not been since I was hurt. It has been something over thirteen months since I was hurt. I have never been free from pain since I was hurt except when I was asleep. Have not been able to sleep well since my injury. I suffer more when the weather is bad than I do when it is good. The fact is that I don't get much rest either day or night.

CROSS EXAMINATION:

I will be 45 years of age in November. I stated in my application for employment that I was born in 1876. I was really born in 1868. I made the false statement as to my age for the reason that they have a system on some roads that if a man is over 35 years of age, they will not hire him. I do not know what the object of the rule is, but there is some objection to a man over 35 years of age. That objection applies on some roads, but I don't know whether it does on the defendant's road. If we go to one road and work and are not over 35 years of age when we leave that road, we can get employment on another road. I purposely made a statement as to my age which was not true, and I knew it was false when I made it. I made the false statement to get the benefit of it. I am in pain right now. My back and both feet hurt me. The expressions on my face are because of the pain I suffer. I am never without pain and don't think I sat for an hour at the hotel without showing by my face that I suffered. I don't know whether I sat at the dinner table and ate my dinner without the muscles of my face being drawn. I do not say that I did not. I don't think I sat in front of the hotel last night for an hour without the muscles of my face giving evidence of suffering; may be I did. The pain in my back at this time is in the small of my back on the left side of the spine. I remained at the hospital 14 days and the hospital doctor treated me after I left there for about six weeks. I had Dr. McCurdy while I was at the hospital; he was one of the surgeons there. After the hospital physicians quit treating me I had Dr. Hall, but did not have him before they quit. The reason the hospital physicians quit treating me was because I filed suit against the defendant. They did not quit treating me before I filed suit. I got Hall after they quit treating me. Dr. Hall treated me six weeks or two months, and did what he could for me, and then him and Dr. Cocke treated me for the last month together. Dr. Hall told me that I was in condition where he did not see that he could

do anything for me. He said it would take time, and he gave me some liniment and plastered my back up, and gave me opiates for temporary relief. I got Dr. Cocke and Dr. Hall quit. I did not feel that I was financially able to pay two of them, and could not have over one doctor. Dr. Hall did not quit, I just went under the treatment of Dr. Cocke who had a different treatment from Dr. Hall. I did not tell Dr. Hall that I did or did not want him any more. He told me he had done all he could for strained muscles of the back and that it would take time. Dr. Hall did not tell me he could not find anything the matter with my back. He told me all he could do for me was to give me opiates to afford temporary relief and limiment to rub on my back and feet. I had an X-Ray picture taken of my feet and it showed the fracture of one bone on the outside and showed no other bones broken that I know of. The picture showed the place where the bone had been broken. I had 8 X-Ray pictures taken myself. Some were taken at Shreveport and three taken at the hospital. There was one picture that showed a formation on my foot above the break. It showed a callous there in the picture. I don't think Dr. Moore when he was on the stand before had in his hands the pictures taken at Shreveport. I think he had the pictures he took himself. I may be mistaken, but I don't think he had the Shreveport pictures when he was testifying. Both of my feet hurt. The right foot was not hurt as badly as the left. I am wearing the same kind of shoe I did when I was here before, I may have a little more of it cut off. If I remember I cut a little more out of the shoe some time ago. My left foot is stiff as well as painful; I can not put weight on it. I have made an effort to use it. I can not put my foot down because the arch of the foot comes down and the pain is severe. It pains me all the time, and when I put my weight on it it pains more. I have not walked on it to see whether it is very stiff or not. I can move my toes. I can not move my foot like you do yours. I presume it is a little stiff. The trouble in my right foot is in the instep between the two joints. I can stand on my right foot but can not

bend the instep. I can put my weight on it and wa[k on it,
but it feels like driving a stick in there when I go to [bend it.
Soon after I was injured I made a statement to the [railroad
people as to how I was injured. My wife wrote i[at my
dictation. The statement you exhibit to me is th[e one I
made. The statement contains this language: "G[ive full
particulars in detail as to how accident occurred?" "While
coupling cars on City Track at crossing near end of [freight
depot platform, and after riding car in and couplin[g up to
two other cuts of cars already in there, by direction [of fore-
man I started to climb down from off of top of car. I put
left foot on ice box casing, and when I did top was [off ice
box, also ice vent was misplaced, my foot slipped. I made
effort to balance myself, and when I did my right f[oot slip-
ped off tin facing of ice box throwing me to the [ground,
striking my back against roof siding of refrigerat[or car."
If I remember right, when I started down off car I [believe
it reads. I don't think I started to climb down. [t says,
"I started to climb down off top of car." That is [orrect.
I made no statement in there about the brake on the [refrig-
erator car. I made no statement about having go[ne over
to see anything about the brake. The refrigera[tor car
shown in the plat as A is the one from which I fell. That
refrigerator car was in there long before I rode the [cars in
that coupled to it. It was the only car there. It w[as nec-
essary that it should be blocked or the brakes set [while it
was in there. If the brake was in good order, it w[ould be
set. The cars have automatic couplers but we had to [couple
half of them. I think the coupling to the refrigera[tor car
was made by backing into it, and that the automat[ic cou-
pler worked all right. To the best of my recollectio[n there
were four or five cars between the refrigerator c[ar and
the engine. To the best of my knowledge [there
was as many as four. The City Track where the c[ar was
slopes down hill to the west. It is steeper down hill [where
the refrigerator car was than it was further west [very
much steeper. When the refrigerator car was left i[n there
by itself, it was necessary to have a good brake on it [to hold

it. We generally set a couple of brakes on cars west of the crossing if there are no cars west of there to hold them. We moved all four of the cars in there to the refrigerator car between it and the engine. We did not set the brakes on all of the brakes on the cars. If there is one or two good brakes set on the car next to the crossing, it will hold the other four cars. If one brake is good it will hold, and if it is not good we would generally set two. The whole five cars were coupled up together. I said yesterday that I was told that I fell on the planks of the crossing. The refrigerator car would not block the crossing, and must have been west of the crossing that wagons go over the track on. The plank must have been longer than the width of a wagon would be, and must have extended beyond the crossing proper. Very often there is a double place where there is a double set of crossing planks for the purpose of unloading and spotting cars for the warehouse. 36 feet would be about the average length of a refrigerator car, and the east end of it would have to be far enough from the crossing for wagons to go over the crossing and clear the crossing. I fell off the northwest corner of the car, and the planks would have had to extend near the west end of the car for me to have fallen on them. The planks would have to be 36 feet west of the crossing or about that necessarily. The engine after we got through would go down the main line and on the lead track. It would be about three car lengths from the refrigerator car across to where the engine would pass, or something like 100 feet. Cars can be shoved in there with the brakes on if the rail is dry for the track is nearly level, but I could not say how it was this particular night. I rode up there on one car with the engine and we pushed the others in, and I then went from the car next to the engine to the next car, and to the best of my knowledge I found brakes set on that. My purpose on the cars was to let brakes off and set brakes. I remember setting the brakes on the car next to the one I fell from, and it may be possible I set the other brake, I don't remember now. I remember that, and if I remember right it was the brake on

the end of the car next to the one from which I fell. I stepped on the refrigerator car with my right foot; the running board is in the middle of the top of the car. When I started from the running board in the center of the car to the roof of the car I made the step with my left foot as I remember it. I had a lantern with me, but you can not see the ground under the lantern when you are carrying it. We do not have them for that purpose, we have them for giving signals. The bottom of the lantern shades the ground, but of course in going over cars we protect ourselves as much as we can with the lantern. I got my right foot on what I supposed was the top of the car, and when I made the step with my left foot I got my left foot on the casing of the ice box. I suppose my right foot was then on the roof of the car, but it was on the ice box door turned clear back on the roof of the car which would leave the hole exposed. My lantern was trimmed and burning and I had a good lantern. The bottom of the lantern would be 18 inches approximately from the ground when I was standing up, and the bottom of the lantern would shade a place around two or three or four feet in diameter. The lantern has a round bottom it sits on, and that bottom is 5 or 6 inches across, and the light is 3 or 4 inches above the bottom. The lantern would shade a space of three feet in a circle I am sure, and that would be a foot and a half from the center each way. I step about two feet at a step, but whether the light of the lantern would shine on the top of the car two feet out would depend on the lantern. We naturally make the lantern shine where we step and protect ourselves as much as possible, and the light shines in front to a certain extent. I guess when I stepped on the running board the light from the lantern was shining on the running board, and it helped some. I don't believe the lantern would shine in the hole in the top of the car. Of course if a man deliberately threw his lantern that way, he could see. These lanterns do not give much light; it is not like a lantern with a reflector. The edge of the ice box might have been six inches or a foot from where I stepped down off the running board. I did not see it until it was too

late. I was in a hurry; we don't have time to take all the caution; in switching you have to work fast. We worked there all night, and sometimes we are compelled to run to catch the engine. At the time I reached the cut of cars next to the refrigerating car I was in a hurry, in somewhat of a hurry. From the time the engine was cut off at the side track and the switchman pulled the pin and threw the switch I don't suppose was over a minute and a half or two minutes. It would take about two minutes to come back on the lead. I was in a hurry. I had to catch the engine. I had to hurry to catch the engine; the engine would not wait for a man. The foreman is the man that controls the movements of the engine. To the best of my knowledge Hart and Lindsey were standing by the car when I fell. They are compelled to be at the crosisng to see that we shove over the crossing and nothing is on the crossing. When the engine went west they would drop off even with the refrigerator car, and would not ride west with the engine to back in. Hart was my partner. We had five men part of the time, the foreman, the man following the engine and three field men, and we have a high-ball man, and when the passenger trains come in he is compelled to be at the switch. Hill was the engine foreman. If I remember right I believe Hart was the high-ball man. The high-ball man is the man that conveys the signals from the engine to the field men. When engines come from the round house, he has to give the hostlers the signal that the track is clear, that the way is open. He has to help us out in our work, and he has to watch the engine to see that it does not run into anything, and that nothing runs into it. He protects the engine against other cars. Hart was also my field partner. Lindsey was also a field man. Their business called them up there near the fruit car. They were there to couple the car in case the automatic did not work. The automatic had made the coupling before the engine cut loose, or at least the supposition is that it did. Hart and Lindsey were still standing there when I fell. When I got on the banana car I had to go to the brake to see whether

it was set or not, and that takes time. Lindsey and Hart were supposed to be at their stations whether they do anything or not. They were standing there when I struck the ground. They would catch the engine at the same time I would. We were always in more or less of a hurry. We wanted to get our work done; we are obliged to be in a hurry. If a train is called for at such and such a time, we are obliged lots of times to be in a hurry. There are times when there is not so much hurry as at others. I had not finished my work when I fell. Hart and Lindsey were there when I stepped on the car and fell off, and the coupling had been made. After I got hurt that stopped the business until they attended to me. We would occasionally get bananas from the man who had charge of the car; he would give them to us, and we would not take them without his knowledge. I had gotten no bananas from the cars that night, but I could not say whether any of the other men had or not. If I remember right, I believe they did, I am not sure of it. I don't think I had but I think perhaps the others had. I could not say whether they got the bananas in the early part of the night or not. To the best of my knowledge Hart and Lindsey had been at the banana car just as long as it took the engine and car I was on to get to the switch and shove in. They walked across there and I went around, and they were there that much ahead of me. The picture exhibited to me shows how the ice hatches were, except on the night I was hurt the cover was open, and the door doubled over on top of the car. There are different kinds of doors on refrigerating cars. From the top of the car you would see part of the tin lining of the hatch and part of the wood. The ice hatch when I fell was open and the door laid back on the roof of the car. Some of the covers are lined with wood and some with metal, but I could not say how this one was. When the cover is thrown back on the roof of the car, that leaves the exposed hole in the top of the car. If the plug is in the hole and the door thrown back, of course it would be impossible to fall in the ice hole. If there is no plug in the hole, there is nothing to

keep a man from falling in. I did not step in the hole, but stepped on the casing. The casing came up some two inches above the roof of the car. The door fits on top of the casing. The door when closed would extend up above the roof of the car an inch and a half or two inches. The cover drops over the casing and fits down over it like the top of a trunk. If I recollect right, some of the doors fit on the inside of the casing, and others have no casing around them at all and come down level with the roof of the car. I have not had a physician examine examine me lately except that I have been under electrical treatment. I am willing to have a physician examine me now in the presence of and in connection with my physician. It is immaterial to me what physicians made the examination suggested. Both of my feet bother me. The trouble with my left foot is where the bone is broken in the arch of my foot. I speak of the broken bone, I suppose you would call it the arch of the foot. It is on the outside where the bone was broken on the foot. I do not think there is any other bone broken in that foot. I can not bear any weight on that foot and can not use it. If I make an effort to put my heel on the floor a few times, my heel becomes inflamed and bothers me more than when I don't do it. I can not sap that my foot is inflamed now very much, but it has a continuous pain in it all the time. It is swollen but is not red and inflamed. It feels like there is fever in it. I don't think it is red. There is nothing the matter with my left leg. In the instep joint of my right foot is where the trouble is with that foot; I can not bend the right foot forward. If I try to bend it, it feels like you are driving a stick in it. I can put my weight on the right foot, and I can put my weight on it standing straight up. I put my entire weight on it when I am walking with crutches, and in going up stairs I put my entire weight on the right foot. There is nothing the matter with the bone of my right leg above the foot. I have a tender place on my right hip where I fell on the crossing plank or whatever it was. That place is between the right hip and spine; it is just a little to the right of the spine on my back. I do not know

whether there is inflammation there that can be observed from the outside, but it is sore enough to let me know it is there. I can not see the place and don't know whether it is black and blue or not. It is tender to the touch. When it is touched it hurts enough to let me know it is there. I feel it all the time more or less. When I put my finger on it, it hurts. It hurts a little to touch it without pressing on it. The hurting is not on the surface, but on the inside. It hurts to touch the skin. It hurts a little just to touch it, and it hurts without touching it. The sensation is there and it hurts when I touch it and when I do not touch it. The sensation and feeling is there the same as ever. I have not been treated for any other disorder except the injury received. I am in good health with the exception of my injuries. During the spring and summer half of the time I would be in bed, that is, half the day, and sometimes more than that. I have had a better appetite than I have now. I do not get the exercise I did before I was hurt and that is the reason I have not a better appetite. I take what exercise I can and when I can. The muscles in the left side of my back get in a condition like a man who has caught cold, a kind of crick, and I am obliged to get in a certain position. If I can get where there is a rocking chair, I can get more ease. If I have to use a straight chair, lots of times I have to lie down or get on my feet. When I was first hurt the muscles of my back were strained, and I had a place hurt between the spine and hip on the right side. There is nothing the matter with my hip except the pain resulting from the injury. There is nothing the matter with either of my legs above the feet. The hurting in my back is all the hurting I have except in my feet. My feet hurt me and the small of my back on the right side is all. The tops of some cars have light colored paint, and some dark colored paint. Whether the hole in the top of a car would show black or not would depend on the color of the top of the car. Lots of cars are perfectly black on top. If the top of the car was painted light and the ice hole was open, it could be seen by a switchman with a lantern, but if the top was paint-

ed black and the hole open, I do not believe he would see it. I am not sure how far the edge of the ice hole was from the running board; it may not have been over three or four inches, I could not say as to that. The distance from the running board to the door of the ice hole varies in different cars, and I don't know how this one was. When I stepped across on the running board of the car from which I fell the light from the lantern would naturally shine on the car, but not directly underneath the bottom of the lantern. The light of the lantern would shine ahead of me some when I made the step. I stepped down on the north side of the running board to see if the brake was set. My lantern was burning and was a good lantern, and with the top of the ice box back there would be a hole there in the top of the car. Of course if I had stopped there and tried I could have made my light shine where the hole was. When I go to make a step on a car, I can make the light shine where I am going. Of course we protect ourselves as much as we can with the lantern, but do not raise it up every time we make a step. We do not carry a lantern for the express purpose of lighting the way. We use the lantern for signals principally. If I had known the ice box was open, I could have made the lantern shine in the hole. If I had known the ice box was open I would not have got hurt. I knew that was a banana car, and I knew that kind of cars had ice bunkers in them. I knew it was on the north side of the top of the car and near the running board. I never knew one to be open before; they should not be open with the cover laid back on top of the car. I had my mind on my work. If I had known the hole was open, I would have seen it; we are not expecting to find them open. I stepped to the northeast when I stepped on the rim of the ice hole. I stepped with my left foot on the casing of the ice box. The hatch is about 3x2 cross ways of the car; some of them are smaller than others. I do not know the size of the one on this car, but I believe it would be about three feet cross ways of the car, and perhaps 18 inches or two feet wide. I set the brake on the car next to the banana car. I don't remember whether

the brake was on the end next to the refrigerator car or not. I was on my way off the cars, and I went to the fruit car for the express purpose, if the brake on it was not set, to set it. When we couple into cars brakes very often get knocked off, and I did not know whether the brake was set or not. I don't know that there was any defect in the car next to the refrigerator car that prevented me from going down off it. I presume it was just as good to go down on as the other one. It is customary to set two or more brakes on four or five cars, all depending on the condition of the brakes. If the door of the ice box is open, it is laid back towards the east the way the car was sitting and I approached it from the west, that is the car. I stepped with my right foot from the running board on to what I thought was the roof of the car, and when I made the next step my left foot went on the casing of the ice box, and it started to turn and I made an effort to right myself with my right foot and fell. The brake staff was west of the ice hole and I intended to set the brake on my way off the car. I was obliged to go around that way unless I wanted to take the chance of falling between the cars. If the ice box door had been closed, I would have gone right over the top of it and to the brake staff. The way I explain the matter does not show I was not going to the brake. I insist that I was on my way to the brake. I have to have one foot at the bottom of the brake at the ratchet to set it. In going from one car to another we sometimes make a step of five or six feet. It was five or six inches from the west flange of the ice bunker to where the brake staff comes up. My foot did not go down in the hole. It turned or slipped on the flange and when I made an effort to catch myself with my right foot I fell from the car. I believe the plug was in the hole and that I saw it there when I went to fall; that is my recollection; I have a slight remembrance of that.

RE-DIRECT EXAMINATION:

The string of cars was west of the car I fell from. As a rule there would be two or two and a half feet between

the ends of the cars. I had my lantern in my right hand and was going along the car. My recollection is that I stepped across on the fruit car with my right foot and made the second step with my left foot. We generally step two or three feet over on one car from another car. After I got on the fruit car I made an ordinary step with my left foot, and that would put me four or five feet over on the ~~first~~ fruit car on the running board of the car, and that would put the brake staff nearly north of me; I then turned around and made a step with the right foot first and then with the left. I was facing east and turned to the north, and I would be facing north or northwest when I made the second step. The brake would be located near the west end of the car; it would be on the extreme end, and the brake staff would be between the running board and the outside of the car. It goes down on the end of the car on the outside. Ordinarily when the door of the ice hatch is opened for ventilation, it would be up five or six inches or six or eight inches, and it had a kind of ratchet arrangement to hold it in position. There is a contrivance with notches in it to hold the door in position. On this occasion the door was not opened at a slant, but was thrown entirely back on the roof of the car. Just at the moment I started to set the brake I did not give consideration to what kind of car it was. Dr. Hall treated me for awhile. I went to his office for treatemnt. I then went to Dr. Cocke, and after that I continued to go to Dr. Hall until he told me he could not do anything more for me that he had done all he could. He put adhesive plasters on my back and gave me liniment and opiates to ease my pain. I went to Dr. Cocke for examination and treatment. Dr. Cocke has not quit treating me.

RE-CROSS EXAMINATION:

I went about five feet over to the ice bunker, and did that in getting on the car and turning in order to get to the brake at the extreme west edge of the car. Lots of times we jump from one car to another and go six or seven feet, not exactly a jump, but just a long step. I guess I stepped

about five feet in going on to the car where I was hurt. I believe I stepped about three feet over the end of the car. The brake was west of where I slipped and the ladder northwest. Dr. Cocke has not attended me at home; I go to his office. For the purpose of ventilation, they set the ice box door at various angles from nearly closed to half way straight up. They do that for ordinary purposes of ventilation and I have seen cars come in the yard that way. I expect to find them in that position when they come into the yards. I do not know how long that car had been in the yards, whether a day or three days, I don't know.

ROBERT HOWARD TESTIFIED FOR PLAINTIFF:

In September, 1912, I lived at Marshall and was working for the defendant as switchman. I remember when plaintiff was hurt and was a member of the same crew with him. I was following the engine and my business was to connect the engine to cars and disconnect it. When plaintiff fell I was going from the side track to the main track with the engine. The engine came on the lead and up the main line and on the City Track. I think we put one car in there when we first went in there and there were other cars there; there might have been three there. The man on the ground gave me the cut off sign and I pulled the pin and took the light engine out. When I was coming down the main line with the engine some one ran out with a lantern and stopped me, gave me the stop signal and I went over where plaintiff was. He was lying on the ground about even with the west end of the refrigerator car on the north side of the track. He was lying on his left side. He was moaning and begged us not to touch him. The yardmaster telephoned for the ambulance. The yardmaster was a man named Winegar. The ambulance came, and we put him on a stretcher, put him in the ambulance and took him to the hospital. I went to the hospital with him. He was moaning all the way to the hospital. He complained of his feet and back, both feet. I went on top of the car from which plaintiff fell before he was taken to the hospital. He said

he fell in the hole or slipped there—he was hurt so he could hardly tell us—and I want up there to see. The ice box door was open and thrown back on the roof of the car towards the east, towards the center of the car. It was unusual to find those doors that way. Those doors open into the ice chambers of the car. They have an arrangement made with an iron rod that holds in a ratchet ,and with that they regulate the distance they elevate the door. The door is over the hole in the top of the car when it is elevated in that way; it stands up over the hole at an incline. I do not know how many times we had been in on the City track that night. We had a car to set in the City Track the night plaintiff was hurt and that was the object in going in there just before he was hurt. We went in that track in the regular routine of work, and there was no certainty as to the number of times we would have to go in there. Trains were coming into Marshall and going out all night long. Marshall was a place of 12,000 or 13,000 people. There are 17 tracks in the yards that go off the main lead. Marshall is a junction point on defendant's road, and there are roads running to Fort Worth and Texarkana and New Orleans out of that yard.

CROSS EXAMINATION:

My work in a general way was to take the engine to the different tracks and on the switches as the foreman says, and be with the engine at any and all times. I would throw the switches for the engine to go in on the different tracks. We were putting one car on the City Track that night, if I remember correctly. There were other cars already in there, but I don't remember just how many. I think we had to make two couplings to get the string of cars attached to the refrigerator car. I think I made those couplings myself. Plaintiff rode on top of the car to the City Track. He would be on top of the different cars. He would walk from one car to another as we coupled up. The City Track at that place was down hill from the east towards the west, being up hill towards the east, and the cars in there would

have to have the brakes set or chunks under the wheels to keep them from rolling out. In a string of cars on that track two or three brakes set would ordinarily hold them. If a car is in on that track for three or four days the usual course would be to set the brakes to hold it. I had one car attached to the engine when I started in on the City Track, and backed that car against some more cars in there, but I don't know the number. I think I made two couplings. After I made the two couplings we had a string of four or five cars in there, and plaintiff was on those cars. He was the only man that rode the cars in there. He went on top of the cars to let the brakes off, and then tie them down—that is, set the brakes to hold them in the track. When the cars got to the proper place, he was supposed to set the brakes necessary to hold them there. One good brake would hold that string of cars at the crossing. The cars were coupled to the banana car, but I did not make that coupling; that would make three couplings in all. When that coupling was made, I got the high sign from the man on the ground and pulled the pin on the engine and went away. I went on and left the cars standing. If a car is left on the City Track two or three days, the brakes are set or put a chunk or chock under the wheels. The car would roll out of the City Track if not held in some way. I was not there when plaintiff fell, but got back and saw him shortly after he fell. I don't recollect just how plaintiff said he got hurt. My understanding was that he said he slipped in that hole or fell in it when he went to set the brake or see if it was set. He was hurt so bad I did not ask him much about it. He said he slipped or stepped in the hole or something of that kind and fell. The refrigerator cars have the doors on top for the purpose of being raised or closed down. They have the rachet so you can raise them to different heights, and that is done by a pin or a ratchet with notches in it. They usually have them fixed somewhere between down and half straight up or 45 degrees of slant. That is done for the purpose of letting the air get into them, and that is called ventilating the cars. I have not been on the road

and don't know how they ventilate the cars on the road, but have seen them that way in the yard. Railroad men have nothing to do with handling the ventilators,, but that is left to the messenger in charge of the car if there is one in charge of the car. That has been my observation since I have been a switchman. I could not say for certain about handling the ventilators, but presume that is in charge of the messenger; I know the switchmen and yard men had nothing to do with it. When the man in charge of the car raises the ventilators, I presume they are to be left that way. No matter how he left them ,we had nothing to do with them and never disturbed them at all. I have seen cars come in off the road with the ventilators raised to various elevations. When cars come into the yards I guess they are supposed to be in charge of a messenger. I know the switchmen have nothing to do with adjusting the ventilators.

RE-DIRECT EXAMINATION:

When the banana car was placed on the City Track, the brake would have to be set to hold it there or it would have to be chocked. If the brake is set on one car and other cars are switched against it, that is apt to knock the brake off the stationary car. There were car inspectors in the Marshall yards to look after the condition of cars. I believe four inspectors worked at night. They are not a part of the switching crew, and their duties are different from those of a switchman. They inspect cars and have nothing to do with handling them. I went to work in the Marshall yards May 10th before plaintiff was hurt, and he was working there then, and worked with me up to the time he was injured. He was a good switchman and a careful man of the company's property and his own safety. He was as good a switchman as I ever worked with. I have worked for the defendant as a switchman a year and a half, and worked for the Southern Pacific 16 months.

RE-CROSS EXAMINATION:

The couplers on all the cars are automatic, and when the cars come together they are automatically coupled if properly arranged. When I go to make a coupling I arrange the couplers before I back into the car. One of the men on the ground, Lindsey or Hart would not necessarily be the man to see to that. They were at the crossing when I backed back. They gave me the sign at the crossing to back up. The man on top of the car is not the one that does the coupling. It would not have been plaintiff's business to see whether the cars coupled or not. I made the coupling myself. I knew the coupling was made when we backed into the car. The man on top of the car by the sound could tell whether it made or missed, especially if he was on one of the cars that struck. A man going from one car to another can tell when the coupling is made if the slack runs out. Frequently when you bump into a car it knocks the brake off; if the bump is not hard and the brake is in good condition, it will not knock it off. Of course, if one brake would hold four or five cars on an incline, that was all that was necessary to have on. Two brakes would be fully sufficient to hold four or five cars, and it would not be necessary to see whether the other brake had come loose or not. The City Track was used for the purpose of putting cars on to be unloaded, and it is so located that teams can drive up and unload the cars, and that is the sole purpose of it. When a car is put there it is for the purpose of staying there until it is loaded or unloaded. We have to take them out and put them back sometimes to get other cars on or out. On this occasion we did not have to take the car out, but backed the other cars to it and coupled them up. I think this car was at the crossing at the time. The car was just immediately east of the crossing when I went back there, and after the other cars were coupled to it it was supposed to be left right there. We had to leave a clear crossing. I have observed how the banana cars are handled when they come in about selling and delivering the fruit. I have seen Mar-

shall there with cars, but I never paid much attention to what he did. They generally took two or three days in getting through selling a car. This was a regular delivery track the car was on. I don't know what contract Marshall had with defendant, but we always put his cars in there. It was my understanding that his car was to stand there until he ordered it away. It was not to be switched out anywhere without his orders. The business of inspectors is to see if there is anything the matter with the cars.

RE-DIRECT EXAMINATION:

They inspect cars to find the defects and protect company property and employes, such as switchmen and brakemen. They have to see that cars are in condition to be handled safely without damage to the property or injury to the employes. The number of times a car on the City Track would be moved in two days would depend on what we had to put in there; it all depends on whether there are any cars there to go out or go in. Switchmen would have to be on top of cars in the City Track. Murphy was a long field man and had to be on top of those cars. Murphy was a sober man. I never saw him take a drink while I knew him.

RE-CROSS EXAMINATION:

We could put cars in there without moving the banana car at times. It was about one car from where Murphy was hurt to the packing house door. They unload one car at a time at the packing house. There is no space below there to turn a team. They could hardly drive over the railroad there. There are no crossing planks there by the packing house or anything of the kind. The refrigerator car sat right at the crossing and the crossing was open and cars could be east of there, and cars were east of the crossing at that time. To the best of my recollection there were cars east of the crossing at the time plaintiff was hurt.

RE-DIRECT EXAMINATION:

Think the City Track would hold about eight cars east of the crossing.

J. H. HILL TESTIFIED FOR PLAINTIFF:

At the time plaintiff was hurt I was engine foreman. My attention was not attracted to the plaintiff until I saw him on the ground. I heard some one groaning and went down there and saw him on the ground. He was lying there moaning and groaning, and complained of his feet and back. I attempted to assist him up and he could not get up and said not to move him. We wanted to put him on a stretcher and take him to the switch shanty until the ambulance came. He remained where he was until the ambulance came and was then taken to the hospital. Had known the plaintiff 18 or 19 years. He was a good switchman and a careful man. He was not a drinking man that I know of.

CROSS EXAMINATION:

I was not at the place of the accident. Asked plaintiff how it happened. I do not remember the exact words that were passed. I understood him to say he slipped and fell into the opening or something to that effect. I don't remember that he said he slipped on the rim of the vent. As far as I know the man in charge of the car attends to the ventilators, and has charge of opening and closing them. Some of the ventilators have a ratchet and the doors can be propped up, and he can raise them to different heights to ventilate his fruit. On the road the doors are sometimes up and sometimes down according to the ripeness of the fruit, and I have at times seen them clear back. On going on those cars we expect to find the doors raised for ventillation. The cars have two doors on each end and the doors can be placed in any position from clear down to clear back. I have noticed a block on some of the cars that the door rests on when it is thrown back, and some of them go back on the roof of the car. Some of the ventilator holes are

lined with zinc and shine to some extent, and some are not lined. Zinc shines more than wood of course.

RE-DIRECT EXAMINATION:

I have seen those doors thrown clear back and they have to throw them back to put in ice. I do not know whether it is customary to have them thrown back when they are not putting in ice, but I have seen them that way. The side doors of the car from which plaintiff fell were both open.

DR. R. COCKE TESTIFIED FOR PLAINTIFF:

I live at Marshall and have lived there about nine years the last time. Am a practicing physician and surgeon and have been so engaged since 1899. I am a graduate of the University of Texas Medical Department. Was in the Texas & Pacific Hospital at Marshall several years and am City Physician of Marshall, and have been four or five years. Know the plaintiff and have treated him; began treating him February 1, 1913. He came to my office to be treated for his injuries. He was suffering with pain in his back and feet. I have continued to treat him up to the present time, and have seen him practically every other day except when the weather was bad and he would not come. I have treated his back with electricity and used adhesive straps to support his back, and have given him medicine for pain and advised him about his feet. The adhesive strips were applied up and down across his back like a jacket on the back. I did that to relieve the pain, and after I tried it he requested me to repeat it and said the strips relieved him. I used the electrical treatment to relieve the pain in his back. All the time I have treated him he has complained of pain and suffering in his back and feet. My opinion is that he has suffered pain all the time, and I have given him medicine to relieve the suffering. His condition now is practically the same as it was when I began to treat him in February. He seems to be completely disabled as a result of the injury to his feet and back. He has been hurt some-

thing over 13 months, and taking into consideration the treatment I have given him and observation I have given his case, I do not see much possibility or probability of improvement in the future. I see no probabilities of his improving. He suffered a broken tarsal bone of the foot, the left foot and a general contusion and bruising of his feet, and in the joints below the ankle joints, the joints below the instep, the tarsal joint. There are quite a number of bones and joints in the foot. I think the joints were bruised and contused and the ligaments strained as a result of the fall.

CROSS EXAMINATION:

He has been practically under my care since February. At intervals he would come two or three times a week, but generally ever other day. Gave him elctrical treatment for the muscles of the back and gave him medicine for pain and advised him about his feet. I told him to use liniment on his feet, and to use hot water on his feet, bathe them in hot water, and keeping that up by adding hot water as he could stand it. I saw a bruised spot on his back but there is now no visible evidence of the injury. The only way to determine about the injury to the back now is by the use of the electrical battery. The battery would determine the injury by resulting pain and the action of the muscles that responded. They responded very slowly to the current, and that would indicate that the muscle was sluggish in its action. At first, regardless of what he said, I could detect an injury to his back. I can not now only by pressure on his back. He says it hurts. I could not tell regardless of what he said. I do not have any device to develop that for myself. The fifth metatarsal bone on the left foot was broken about the middle, and I found no other fractured bones. I saw an X-Ray picture of the foot and it showed a fracture of the bone, and it demonstrated that no other bones were broken. The left foot is swollen now and there is pain and tenderness there yet, and there is some enlargement of the bone. It was first a callous thrown out in an effort to repair and it is now true bone. The foot is not red. I do not

think the temperature of the foot is higher than normal. There is no visible evidence of injury to the right foot, just tenderness over the instep. There is pain in his right foot when you attempt to bend it, and there is a stiffness of the right foot in the instep. There are no other claimed injuries except to the back and feet. The present set of the injury is in the lower port of the back to the right of the spine. Plaintiff could similate pain in a measure. I hardly think he could give the evidences of pain he does without having pain. There are many cases where physicians have been misled by the conduct of the patient. A man may worry over his condition until he becomes hysterical, neurosthentic or hypochondriacal, and there are cases where people worry and believe their condition worse than it really is, and I have heard of such things as that kind of worry over the outcome of important law suits. Mr. Murphy was examined by physicians today and I was present. I saw nothing in the examination different from what I have observed in my treatment of him.

RE-DIRECT EXAMINATION:

Do not think the plaintiff has neurosthenia. It is not difficult to make a diagnosis of neurosthenia. The X-Ray shows nothing but injuries to the bone, and do not show injuries between the bones.

RE-CROSS EXAMINATION:

A man with neurosthenia is generally subject to headaches and various nervous troubles, flushing and other nervous manifestations which can be determined. I did not examine plaintiff for neurosthenia, but I have been in contact with him every other day practically for months. Usually muscular troubles repair themselves or inflame right away. Proper exercise helps muscular troubles at times.

CHARLES WINEGAR, by his deposition taken December 2, 1912, testified:

I was night yard master of the defendant at the time plaintiff was injured. Now live in California. Had known plaintiff about two weeks at that time and had been at Mar-

shall about a month. Plaintiff was what they call long field man switching in the yards. We worked at night. He was injured about 4 o'clock in the morning on the City Track right across from the yard office near the corner of the Swift Packing House. I was in the yard master's office and heard some one holloa and went out to find the cause. I got to plaintiff as quickly as I could, and two of the switchmen were already there ahead of me. Harry Hill was foreman of the crew, Robert Howard was following the engine, Lindsey was short field man, plaintiff long field man and C. Hart hurder. Plaintiff was crying out like he was suffering great pain. When I got there he was lying on the ground about two or three feet from the northeast corner of the car just like he had fallen from the car. The crew had run the engine in on the City Track to spot some cars, and plaintiff was on top of the cars for the purpose of setting brakes on the cars so they would stand. His duties required him to go on top of cars switched that night. Had not seen plaintiff since the supper hour. He lost his footing and fell from the northwest corner of Car S. F. R. D. Refrigerator. The car he fell from was on the City Track. I don't remember the number of the car. The City Track runs east and west. He was at the west end of the car on the north side. There were some two inch planks lying at the point where he fell to enable wagons to cross the railroad tracks. I examined the car to see why plaintiff fell. There were some ventilators or ice holes on the top of the refrigerating car. I found them open. They are on top of the car at each end and on each side of the running board, and extend from the end of the car about two and a half feet, having an opening of 2½ feet square. The edges of the ventilator holes extend about two and a half inches above the car roof. There is a cover or plug that closes the top of the ventilator, and over this there is a door that fits flush with the top of the edges of the ventilator. In the west end of the car from which plaintiff fell the ventilators were open, the tops or doors being thrown back towards the east end of the car, and the plugs or covers of the holes were pushed down into

the ice box something like you would push a bucket top down into a bucket by putting it edgewise. Have been in the railroad service since 1893. Was a conductor 10 years and the rest of the time, with the exception of the last two years, was engine foreman and switchman and night yard master. Have worked for five different railroads. Switchmen have nothing whatever to do with the opening and closing of ventilators in cars at Marshall, Texas. The conductor sees that the ventilators are regulated on the road, and a man is assigned to attend to them while the cars are in the yard. The seal clerk is usually assigned to this duty in the yard. It is not customary in the Marshall yards of the defendant or anywhere else that I know of to allow the ventilators or ice holes in refrigerator cars to remain open with the doors thrown back and the plugs out. The brake on the car was on the north side of the running board and on the west end of the car. It is not usual to leave ventilators open. To do so would be dangerous to switchmen.

CROSS EXAMINATION:

I was yard master and had no business on top of the cars. Think the cars were standing still when plaintiff fell. The holes were for ventilating the cars. I was discharged by the company for Rule G; was not given a hearing. Every car that was switched in Marshall yards the brakemen and switchmen were required to try the brakes and see if they were O. K. to avoid damage to the car and freight and personal injury, and this can be done only from the tops of the cars. The ventilators are adjusted according to the weather, but are not supposed to be wide open at any time.

PLAINTIFF offered to prove and did prove that the life expectancy of plaintiff was 24 years.

DEFENDANT objected to the proof of life expectancy

on the ground that the same was inadmissible in this character of case.

Objection overruled.

Defendant excepted.

PLAINTIFF RESTS.

DEFENDANT offered in evidence the testimony of Chas. Winegar from his deposition taken 27th day of September, 1913, as follows:

CHARLES WINEGAR TESTIFIED, TAKEN SEPTEMBER 1913, AS FOLLOWS. Read by defendant:

I live at San Barnardina, Cal., am a painter, at the time Murphy was hurt in Marshall, I did not know of my own knowledge, who was assigned to the duty of looking after the ventilators of the refrigerator cars in the Marshall yards of the Texas & Pacific Railway, if I so stated in my former deposition, I did not intend to so state. There was a man in charge of the car from which Murphy fell. I don't know whether he was a messenger, a private citizen or an employe of the Railway. There was a man in charge of the car. I don't know who he was. There were bananas in the car. The car was on the City Track in Marshall, and was there for the purpose of the man in charge, selling the bananas. I am not acquainted with the rules promulgated by the Refrigerator Service Association. I know there are rules governing transportation of refrigerator cars, but I don't know by whom they were promulgated. Such rules were in force on the Texas & Pacific Railway, and when I worked at Marshall, but I don't know who promulgated them.

I have never seen a check clerk of the Texas & Pacific Railway give any attention to the ventilation of refrigerator cars in the defendant's yards at Marshall. I don't know to whom the Texas & Pacific Railway assigned the duty of looking after this part of their business. When there is a messenger in charge, nobody has a right to interfere with that car, as far as I know.

CROSS EXAMINATION READ BY DEFENDANT:

I don't know who owned the bananas in the car. I could not say whether a man named Marshall or not, a man was in the car all the time it was in the Marshall yards, for the purpose of protecting and selling the bananas. I didn't know his name. That was not an exceptional case, during the time I was in the yards, a man was allowed to stay and sleep in every car that was loaded with bananas consigned at Marshall, Texas. I think the agent is supposed to look after said cars. They can not receive or deliver freight only when the agent is there, except in the case of a banana car, the man in charge of the car can sell any time of the day or night. The railroad had at Marshall, one night watchman, to watch the freight depot and to assist in loading and unloading cattle, also one seal clerk and four inspectors. At the time Murphy was injured, the Texas & Pacific Railway did not permit trespassers or strangers to interfere with the cars or doors and openings in cars in the yards at Marshall. About the time Murphy was injured I never knew of any case where the ventilator doors was allowed to be left wide open and unprotected, the side doors can be swung wide open or closed on either side. The openings on top are arranged with the ratchet so the shutter can be raised to an angle of forty-five degrees for ventilation. I have never noticed in my experience a hatch on top of the car being wide open and the plug out except in this case. I never knew that the Texas & Pacific had turned over to the Refrigerator Service Association the management of its roads and yards at Marshall at the time Murphy was hurt. Murphy was employed by the Texas & Pacific. I don't remember whether the side doors of the car was open when Murphy fell from it or not. I never saw the yard clerk looking after the openings in top of the refrigerator cars in the Marshall yards. All the cars in the Marshall yards did not have holes in the top of them like this refrigerator car. I don't know of anybody who was assigned to the duty of seeing that they were closed. They had four car in-

spectors, a seal clerk and a watchman, if the ice vent in the top of the car is partly open set with ratchet a man could see it, if it is thrown back it looks like a regular car roof. A man engaged as Murphy was, did not have the time to inspect the car on which he was working to ascertain the condition.

DR. J. A. MOORE TESTIFIED FOR DEFENDANT:

I am a physician and surgeon and chief surgeon for the defendant at Marshall. Remember when plaintiff was hurt. They brought him directly to the hospital, and I saw him the next day after he got there. Both his ankles were sprained, and his feet and especially his heels were bruised, and subsequent events proved that he had one small bone in his left foot broken, and he had a slight sprain to his wrist and was complaining some of his back. His main complaint when he first came was his feet, and he commenced complaining of his back later; after he began to get up he said several times that his back hurt him some. Both his feet were swollen and his ankles were sprained and his feet were bruised and discolored. The bone that was brokn was in the middle of the left foot on the outside. I made several X-Ray pictures of the foot, and this broken bone was about all the pictures showed. The X-Ray would show a bone misplaced or forced out of its position. It shows the bones and not the flesh. Some X-Ray pictures were taken by a physician at Shreveport and we had them here at the last term. Treated plaintiff several months after the injury. There was a gradual improvement in his feet, that is the swelling went out slowly and the discoloration disappeared. There was a slight enlargement where the bone of the left foot was broken. His wrist got all right. Towards the last he began to complain more of his back. His back symptoms were entirely subjective, stated by himself. I could not see anything wrong with his back though he complained of it. A muscular injury where no bones are broken gets better. It is not usual for a muscular injury to remain the same as it was. I would fir.d no injury to the bones of his

back. I examined plaintiff today. His right foot is a great deal better and the swelling is pretty near all gone from the right foot. There is an enlargement around the seat of the fracture of the bone in the left foot. The symptoms of a back injury are subjective. He complains of his back. He has adhesive strips on his back. I hardly know what the effect of the adhesive plaster would be. He says it makes his back feel better. They act about like putting a rag around the head for headache. I did not find anything wrong or any unnatural condition about his back. I endeavored to see. Dr. Hall and Dr. Cocke examined him with me. I believe the future course of his injuries will be favorable. I mean he will get better. I think it would be good for him to gradually force himself to use both feet. I have noticed the way he walks; he does not use his left leg at all. I could not see where the use of both legs and feet would have any effect on his back injury. I think he should try to use his feet. I think he should use his feet all he can from time to time. I do not see why he could not regain the use of his feet.

CROSS EAMINATION:

The tendency of the adhesive plaster is to support the muscles, but it would not support the back bone at all. It has a tendency to brace and hold the muscles together. There is no way to tell just what the future course of his troubles will be except what we have seen of similar cases in the past. The picture shows the broken bone in the foot. It was the bone on the outside of the foot that was broken; one picture shows the break and the other more the enlargement of the bone. One picture is looking from the bottom of the foot and the other from the side of the foot.

DR. R. C. HALL TESTIFIED FOR DEFENDANT:

I am a physician and live at Marshall. Treated plaintiff for an injury he received. I commenced treating him before last February, but I don't remember the time. I was treating him at the same time Dr. Cocke was, but I think

he came to me first. Dr. Cocke treated him later. As well as I remember plaintiff told me Dr. Cocke was treating him, giving him electrical treatment while I was treating him. I treated him up to the latter part of February, but I don't remember the date. When I first began to treat him his left foot was swollen considerably, and the right foot was not swollen so badly; he complained of pain in both feet and complained of his back. I examined his feet and the pain and swelling was all I could detect. The left foot was the worse hurt. Did not find any broken bones until the X-Ray showed it. I could not find it by the examination I made before the pictures were made. I looked at his back the best I could. I made measurements to determine whether both sides of the back were the same, and found them both to be the same. I could not find anything the matter with his back except that he complained of pain. Also from the pain of which he complained, I found no disorder of the back. I examined plaintiff today with Dr. Moore. His left foot is still considerably swollen, but I could not detect any swelling in the right foot at all. He had adhesive strips across his back, but I could not see anything abnormal about it. He still complained of pain in his back. It is a question with me as to whether it would be better for him to keep his feet at absolute rest or attempt to use them. I have not had experience enough to justify a conclusion in that matter. Rest is essential in most inflammatory conditions. The foot might be enlarged and not permanently disabled. If it is a dropsical condition, use would be good for it perhaps, I don't know. He might have a dropsical condition of the feet and no permanent disability. Plaintiff had an ankle support on his left foot, a leather contrivance laced in front, and there was a bottom one I think was of metal covered with leather for the arch of the foot, and it was held in position by a rubber band. I think the rubber band would tend to impede the circulation some, and if it impeded the circulation long, it would cause an unnatural look to his foot. If you put a tight rubber band around your finger it will make it puff up and turn red. The blood accumulates from

the pressure and is not carried back. His condition is some better than it was last winter, but the left foot is still swollen.

CROSS EXAMINATION:

I have heard described the kind of fall plaintiff received, and a fall that distance from the top of a box car could produce most any kind of injury. It was a right sharp fall. The results of the fall would be owing to the condition of the ground to some extent. I consider it a pretty bad fall, yet some boys will jump off a car bare-footed and it don't kill them. I could not see actual evidences of injury to his right foot so much as the other one, but he complained of both feet. Up to February the left foot was very much swollen and the right one was swollen some. He complained of a good deal of soreness and stiffness in the right foot below the ankle. I judge he had a sprain with a sprained ankle. The left foot was very much swollen and is swollen yet. It has been 13 months since the injury, and it looks like the left foot ought to have done something by this time if it is going to. I have not had much experience in the line of how long it will take an injury of that kind to repair. I have never treated an injury to the foot a year. I remember one man who had a sprained foot and he was crippled as long as he lived and had to go on crutches, and he was a young man. Plaintiff gave me the symptoms of suffering pain in his back and feet. He looked like a man that was suffering pain and seemed to be suffering when I was treating him. I think I weather-boarded his back with adhesive plaster. I thought it would brace the muscles of his back some. I do not know anything about electricity and never have studied it at all. Plaintiff and I had no falling out. I treated him as long as he came to me.

RE-DIRECT EXAMINATION:

Plaintiff's general health appears to be good. With his condition of health it seems to me like he ought to recover.

I have never seen any reason why he could not use his right foot.

RE-CROSS EXAMINATION:

I have no opinion as to why he can't use his right foot. If the bones of the right foot were jammed, the X-Ray would show it, show they were in a jammed condition. If they remained jammed the picture would show it. If it was scinovitis, it would show swelling. The right foot is not swollen now. I can see no reason why he can not use his right foot at this time. I never found any abnormalities about his right foot except the swelling at first, nine or ten or eleven months ago. There are in the foot seven tarsal, five metatarsal and 14 phalanges. I can not tell from the X-Ray whether the bones are closer together than they ought to be. They seem to be in perfect order as far as I can see. The place you point to in the picture is not the instep of the right foot where he complains. The broken bone was in the left foot. I could not tell very well from the picture whether the joints are normal or abnormal.

S. A. PARKER TESTIFIED FOR DEFENDANT:

Live at Longview, Texas, and am night yard master for the defendant. I have recently had occasion to be on top of a refrigerator car with a lantern at night. That was one night last week. The car had four doors on top. Some refrigerating cars have but two doors on top. I approach the car from the west and when I first approached it none of the ventilator doors were open, and I afterwards approached it with the doors open and with a lantern in my hand. The lantern had a handle to it, and the bottom of it would be about my knee. I took notice of how the ventilator could be seen in approaching it. It could be readily seen approaching the car. Most the ventilators are lined with galvanized tin, and it shines. On approaching an open ventilator on the north side of the west end of a car and coming from the west, it could be seen with a lantern at night about 10 feet. The ventilators are close to the ends of cars. In

approaching a ventilator car at night with the door open for the purpose of setting the brake on the end of the car, I should think a switchman with a lantern ought to be able to see it. It is prominent and shines. I don't see how a man could step on the car with a lantern and the door open and not see it. When a messenger is in charge of a ventilating car, the trainmen have nothing to do with opening and closing the doors; the messenger attends to that himself. All standard refrigerating cars have doors on top, and on the road the doors are sometimes open and sometimes closed. Most of them have four doors on top. I have been in the railroad service 13 years as brakeman, conductor, switchman, engine foreman and night yard master. Some of the doors are so arranged that they can be set at different heights and some of them have no arrangement of that kind, and if you ventilate the cars you have to lay the doors back on the roof of the car. Some ventilators have high tops—that is, close on casings and others are level with the top of the car when closed. Some of them have an arrangement with notches in it so they can be set at the height desired. A great many of the doors on that kind of cars are often found laid back on the roof of the car.

CROSS EXAMINATION:

I have been night yard master at Longview since December, but never worked at Marshall. Before I went to Longview I worked at Shreveport, and before that worked for the Illinois Central in Mississippi and Tennessee. I have never worked at any other place in Texas except Longview, and never lived in Texas before I went to Longview. I was called as a witness in this case day before yesterday. Mr. Young, one of defendant's counsel, came down to the yard in Longview one night and asked me if I would not show him a ventilator car. We went up and found the ventilators closed. I did not find them open for a switchman to fall in. Have been working for the defendant seven years, and mean to say that I have seen ventilator cars in the yard with the doors laid back on the tops of the cars, but that is not a cus-

tomary condition and it is unusual. Cars are often left in that condition. I am not able to say now where I have seen cars with the ventilator doors back on the roof of the car, but I know I have seen it. Switchmen carry their lanterns in the right hand, and in going from the top of one car to the top of the other, they make a kind of spring over the opening between the cars, so as to land safely on the other car. He makes a kind of hop, a little more than a long step. There is about two feet between the cars, and a careful man would try to land eighteen or twenty inches from the end of the next car, and if he landed on one foot he would naturally bring the other foot ahead of it about a foot and a half. If he was going to set the brake that is on the end of the car, it would be natural for him to turn towards the side of the car or swing his body towards the side of the car. He would throw his right foot on the side of the car, and then step in a turning position with his left foot to go towards the brake. That would about place him over the ice box on a refrigerator car in turning. There is no rule of the company that requires switchmen to inspect cars that are being used or handled by him. They have car inspectors and repairers whose duty it is to inspect cars and keep them in a safe condition so as to be operated with safety. I understand it to be the duty of a car inspector to look after the cars and the safety appliances. It is also the duty of an inspector to see that the equipment is in safe condition to be handled by the operatives. I should think it would also be his duty to see that there were no holes or openings in the tops of cars into which switchmen and brakemen would probably fall in the discharge of their duties. That would be my understanding of the matter. In other words his title implies that his duties are to do everything with reference to inspection of cars necessary to the safety of train operatives. The switchman's lantern is for the purpose of lighting his way at night as well as for giving signals. If he went out without a lantern, he would not get very far in the dark. Car inspectors use a larger lamp than switchmen are provided with. A switchman's lantern burns an inch or three-quarters of an

inch wick. I went on the top of the cars for the purpose of experiment at the time I was requested to do so by Mr. Young. I knew the doors were there, and when the ventilator doors were opened, I walked up looking for them.

RE-DIRECT EXAMINATION:

A switchman would not close a ventilator door if a messenger was in charge of the car. He would leave that to the messenger. The kind of holes in the top of a car that an inspector would look for would not be ventilator holes, but defects in the roof of the car, and the purpose of inspection is to have them repaired. In going from one car to another a switchman would walk on the runnig board in the center of the top of the car, and the ventilator doors are on each side of the running board, within a few inches of the running board. I think a running board is about 18 inches wide. A man in stepping from one car to another would naturally look at the running board. I never made a step from one car to another without looking at the running board. I do not think there would be any way to look at a running board and not see an open ventilator to the side of it.

G. S. McNEES TESTIFIED FOR DEFENDANT:

Live at Longview and am a Deputy Sheriff. I had occasion recently to go on top of a refrigerator car at Longview at night. In approaching a refrigerator car, and in going from another car to it over the tops of the car, I could without difficulty see an open ventilator for a distance of 7 or 8 feet. In stepping from one car to another on the running board, a man with a lantern could see an open ventilator on the car on which he was stepping, because it is right by the side of the running board. In stepping from one car to the other and looking at the running board, I can not see why a man would not see the open ventilator. The ventilator I experimented with was lined with zinc or tin or something like that, some shiny substance.

CROSS EXAMINATION:

I am a Deputy Sheriff and not a railroad man. The refrigerator door was open when I went on the car. I think Mr. Parker opened it. I went there to see how far I could see it with the light I had, which was a signal lantern of the kind used on the defendant's road. That was Thursday night of last week. I was not engaged in setting brakes on the car or assisting in the switching, and was there looking for a hole. I was carrying a lantern in my right hand and watching to see how far I could see the hole. In going from one car to the other I guess I stepped three or four feet, which would put me about even with the hole, and when I turned around it would put my body about over the hole. I don't know that I saw a train operated on the road with one of those holes open. I am not a railroad man and never paid any attention to that. I have been at Longview about eight years. The doors on the cars are right by the brakes. If a man was going to set a brake, I don't think he would step in the hole to set it. He would see it before he stepped into it. Of course I could not imagine a more dangerous place than a hole in the top of a car. It was about 8:30 at night when I was on the car.

J. O. RUSSELL TESTIFIED FOR DEFENDANT:

I live at Longview and have had occasion recently to go on top of a refrigerator car with a lantern. In passing along the running board and going from one car to another, I could see an open ventilator hole in the top of the car before I got to it. I would see it when I stepped over on the refrigerator car on the running board. You could not look at the running board without seeing it as close as it is to the running board.

CROSS EXAMINATION:

I went and made the experiments on the car at the request of Mr. Stinchcomb. I am not a brakeman nor a switchman. Mr. Parker was on the car with me; he has

been a brakeman and switchman. I am a carpenter. I took the lantern and was looking to see if I could see a hole. I saw it when I got in 10 or 12 feet of it. I guess it would be pretty dangerous to have a hole of that size in the top of a car where a switchman would have to go to set a brake.

RE-CROSS EXAMINATION:

I carried the lantern in my right hand, and the bottom of it would come about my knee, and the light from the lantern would show about 16 or 18 inches from the bottom of it. This is, to say, for about that distance the floor under the feet of the man carrying the lantern would be obscured for about that distance by the shadow from the bottom of the lantern. I am not in any way connected with the defendant.

DEFENDANT introduced in evidence the affidavit of F. J. Dodds as follows:

State of Illinois, Cooke County: Before me, the undersigned authority, on this day personally appeared F. J. Doods, who after being by me duly sworn, says upon oath that he is in charge of the safety appliances for the Santa Fe Railway System, and that he knows the manner in which S. F. R. D. cars Nos. 3354 and 3048 were constructed, and knows how they were equipped and constructed originally, and says that in all material parts the two said cars were constructed alike; that the brake shafts, ventilator doors and running boards, in all material parts, of both of said cars were constructed alike, and at similar places on the said cars; the cars were of about equal height and the brake shafts of both cars extended about the same height above the ends of the cars. The two said cars looked alike and were alike and were constructed alike in all material parts, being of the same dimensions and make.

F. J. DODDS.

Sworn to and subscribed before me on this the 30th day of September A. D. 1913.

ARTHUR G. JOHNSON,
Notary Public of Cook County, Illinois.

W. M. MARSHALL TESTIFIED FOR DEFENDANT:

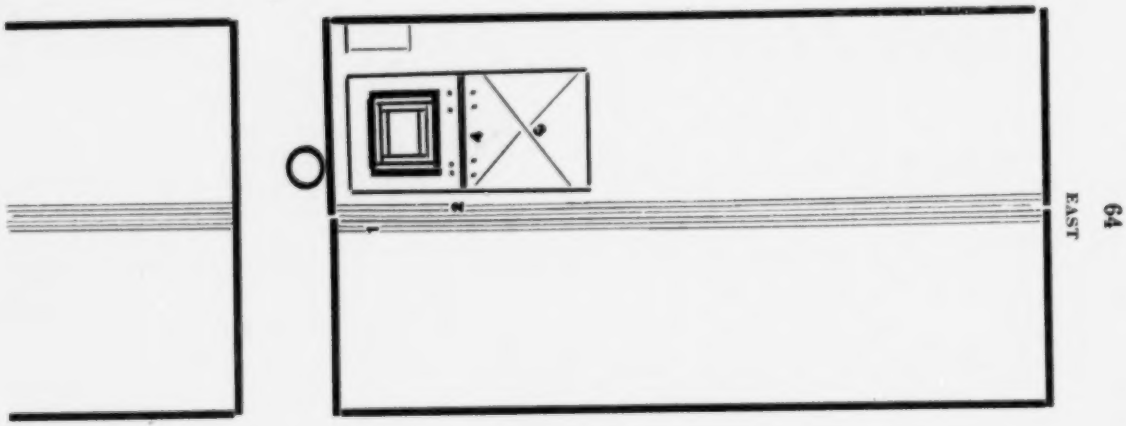
At the time plaintiff was hurt in falling from a banana car in the Marshall yards I was there in the car asleep; I don't remember the date. I did not see him fall, but he waked me up holloaing and taking on out there. The car contained bananas, but I really could not tell how long it had been there. I had iced the car once or twice before that. I ice the cars all along the road. We ice the cars and when the ice plays out we get some more and ice them again. When we got to Marshall the car was not full. We peddle the bananas out through the town. I have the cars placed on the side track and ready to unload; I believe they call the track on which the car was placed, the team track. I had the car placed there where we could get to it with wagons. I have charge of the car and open or close the ice bunkers or have the man that is with me do it. If the car gets too hot, we open the vents on top and open the side doors of the car so as to ventilate it. We keep the doors open so the air can get through the car. When we have ice, we close the doors to keep the ice from melting and it keeps the car cool. If it is too cold, we close the car and if too hot, we open it. Of course when the bananas are nearly gone we open up everything. I don't think I opened the openings on the car at the time plaintiff was hurt; I guess I told some of the boys working for me to open them. I had to stay with the car myself that night. The holes were open the night of the injury. I ordered them opened and they were open. I could see the light through.

CROSS EXAMINATION:

The holes are primarily to put ice in. The ice is put in bunkers and does not go in where the bananas are. The place where the ice goes is shut off from the bananas in the end of the car. There is a partition. The opening from the outside does not open inside of the car proper, but inside of the bunker. There is a hole on each side of the car to put ice in. The ice is separate from the banana part of the car.

There is a box in each end of the car to throw the ice in and the ice can not get with the fruit. There is no way to go from the ice bunker into the car. There is a wire screen in there to let the air through, but a man could not get from the bunker into the car. When the top is thrown back you can go into the bunker, but not into the car. The air can get from ice box into the car both at the bottom and at the top. The doors are arranged with a kind of ratchet and lever to regulate the height to which they are raised, so that they can be opened and at the same time keep the hole protected so a man can not fall in there. Lots of times we fasten them up when running on the road. When it is partially raised it affords a protection against anybody falling in the hole. He could stumble over it, but would not step in it. The car was turned over to me at Galveston; I don't know whether I came from Galveston or not, but the car came from Galveston. If I am not there to go with it myself, they would wire me. I was going to Galveston regularly all the time to come out with them, anywhere from two to five or six cars; I do not know when the car reached Marshall. We take charge of the cars all the time leaving Galveston. I just keep charge of the car until I get through with it. I am there for that purpose to look after the fruit. I have that control of the car, and they never did stop me. Sometimes I have white men and sometimes negro men to look after the cars and help me in my work. I don't know who I sent up there to look after the ventilators before the plaintiff was hurt; I usually send some one up to raise the ventilators. They do not set my cars at the same place all the time, but they are handled just about like any other cars. The cars are placed where I can get to them with wagons. They may switch it around awhile and set it back and may not set it at the same place, but they put it where I can get to it. They always leave the cars where I can get to them with wagons.

NORTH



64

EAST

Plat No. 2, Showing Top of a Car

SOUTH

Murphy testified on cross examination referring to plat No. 2: I approached the car from the west, my first step was with my right foot at the point marked 1, next step was with my left foot at the figure 2, next at figure 3, which proved to be on the door of the ice box thrown back, my next step was with my left foot at figure 4, which was on the casing and caused my foot to slip and that caused me to fall.

Defendant proved that the various railroads had adopted a system of standard rules entitled:

"Railroad rules and refrigeration governing the handling of perishable freight. Circular number 27B, enforce in September 1912, and adopted by the A. T. & S. F. Ry., Grand Trunk Railway System, Union Pacific Railroad, and about sixty other roads, including the Texas & Pacific Railroad.

Plaintiff read in evidence the following portions of said rules applicable to the case:

Rule 9, Item 47: Messengers Instructions:

Messengers in charge of Perishable Freight must be assisted to the fullest extent in protecting the interest of the owners and of the railroad, and their instructions as to refrigeration, ventilation or method of transfer will govern on cars in their care, regardless of way-bills instructions, even if messengers subsequently abandons cars, but messenger's instructions must be endorsed, signed and dated by them on or securely attached to the way-bills (cancelling at the same time the previous instructions thereon) and the facts (including point where instructions are given) duly recorded by the conductor or agent in whose custody the way-bills may be when so endorsed.

Rule 21, Item 72: Manner of Icing:

Placing Ice in Tanks: Chunck Ice: When tanks are empty, the first ice put in must be broken small enough so that when dropped it will not break bottom gratings. The remainder should be broken into lumps of convenient size to fill all spaces. There should be no space under the roof or running board of a fully iced car.

Fruits, Berries, Melons, Vegetables, Cured and Smoked Meats, Butter, Eggs, Cheese and other commodities, will be governed by this rule unless use of salts is specified. (See Item 73).

Bananas are not ordinarily transported under refrigeration and should not be iced or re-iced without specific authority on billing or from owner or his representatives. (See Item 137; Transferring). When iced or re-iced it is not safe to close all ice hatches as this would be apt to chill the bananas which are more liable to damage by chilling them than other fruits and vegetables. Bananas are usually accompanied by messengers in charge whose custom it is when such cars are iced, to leave ventilators open and plugs out, at least one end, thus allowing cold air to escape.

Rule 26, Item 93: Ventilating in Transit and at Destination.

Noting and recording temperature and ventilation. See Items 87-88. Employes in charge must examine way-bills and follow implicitly the instructions thereon. If way-bill envelopes are used the notations thereon must not be relied upon but all billing enclosed must be examined.

Employes must frequently determine temperature and examine all ventilating devices, adjusting the same in accordance with way-bill instructions and weather conditions.

Employes in charge at originating inspecting, junction and destination stations, and conductors (when first taking cars) must record the position of all ventilators and openings making separate record every time any change in position is made, showing date, hour and temperature, or other reasons for such change.

Hatch plugs must be in when ventilators are closed and out when ventilators are open, except when otherwise provided on billing or by messenger in charge.

Note. The delivering road at junctions shall assume the responsibility of giving proper attention to the special ventilating instructions on the billing, and in the event of its inability to do so shall make special arrangements with the receiving line, which otherwise will be justified in assuming

that the special ventilation has been given by the delivering line.

Rule 26, Item 99. Ventilation in Transit and at Destination:

Ventilation of Bananas and Pineapples: The Carriers assume no responsibility for ventilation of bananas or pineapples beyond a compliance with instructions issued by shippers or consignees. Cars should go through to destination with ventilators in same position as when received by carriers unless changes by a messenger in charge or by written order of owner or his representative. Copy of order must be retained by the person receiving it, and the original securely fastened to billing and accompany car to destination, and full particulars of the action taken must be duly recorded in permanent form.

(a) When instructions are received to open ventilators, all hatch covers must be fastened open and all plugs removed.

(b) When instructions are received to close ventilators, all plugs must be put in place (tightly) and all hatch covers closed.

(c) Any modifications of the foregoing instructions providing for partial opening or closing of ventilators must be explicitly stated in the instructions and strictly carried out.

Rule 29, Item 137. Transferring Shipments in Transit:

Bananas, when transferred, are usually injured by being bruised and reach destination in bad condition. It is therefore necessary to avoid transfer by repairing cars, if possible. When transfer can not be avoided, it must be done promptly, with great care, and fruit placed in same position as originally loaded by shipper. Employes in charge should if possible, confer with proper official as to best way of transferring.

This is all the evidence.

68.

CHARGE OF THE COURT.

M. J. MURPHY

No. 596. vs.

TEXAS & PACIFIC RAILWAY CO.

Gentlemen of the Jury:

You have now reached the point in this case where it will be your duty to take the principles of law which the court will give you in charge and apply them to the facts in evidence, and therefrom ascertain and decide whether the plaintiff be entitled to a verdict, and, if so, for how much, or whether the defendant be entitled to a verdict in this case.

The plaintiff has alleged in his petition that on the occasion of his injuries he was in the employ of the defendant company in the capacity of switchman, and that on the night he fell from the car and was injured while in the discharge of his duties as such switchman he went upon the top of a refrigerating car located on the track of the defendant company in its railroad yards at Marshall, Texas, for the purpose of discharging certain duties incumbent upon him by virtue of his employment. That it became necessary in the discharge of those duties to pass along the top of the car, and that in so doing he stepped upon the casing of one of the ice bunkers in the car which had been constructed for the purpose of refrigerating the car.

He alleges that this ice bunker had certain casing which extended above the roof of the car, and that in passing along he stepped upon this casing, and that his foot was thereby caused to slip, and that he was thrown from the top of the car to the ground below and injured as alleged in his petition. He alleges that at the time he stepped upon the casing the cover of the ice bunker had been left open and thrown back, and that this leaving of the ice bunker open was an act of negligence upon the part of the defendant

company which was the direct and proximate cause of his injuries.

It appears from the evidence that these refrigerating cars are constructed with bunkers at each end in which to place the ice and regulate the temperature of the car. It further appears from the evidence that the ice bunkers are provided with covers for the openings in which the ice is placed, and that these covers may be opened or closed as it may be necessary.

The plaintiff alleges that on the occasion of his injuries it was the duty of the defendant to have the cover over the bunker in place so that the opening would be closed, and that the failure to so close this opening was the act of negligence which caused his injuries.

The defendant company has filed a general denial to all the allegations of the plaintiff, and it furthermore alleges that at the time of the injury of the plaintiff the car from which he fell was in the control of a man named Marshall, who had possession of the car and had it loaded with certain fruit which he had shipped to Marshall, Texas, from some other point on the defendant company's line. The defendant alleges that if the cover to the ice bunker was out of place and the opening left in the bunker, that the same was done by the direction of Marshall without the knowledge of the defendant, and that the defendant is therefore not responsible for the bunker being in that condition. The defendant further alleges in its answer that if the plaintiff was injured his injuries were caused by his own negligence in failing to exercise proper care for his own safety in passing along the top of the car.

This statement from the pleadings will give the jury so much of the salient points in the case as in the judgment of the Court is necessary in order for them to understand the instructions as to the law which will now be given to you.

The general denial which the defendant has plead in this case puts upon the plaintiff the burden of establishing his right to recover by a preponderance of the evidence. This is a substantial right which the law accords to every per-

son who is sued in a civil action—that is, where the defendant has plead a general denial, then under the law the plaintiff must assume the burden of establishing his right to recover by a preponderance of the evidence, and, in case of his failure to so establish his right to recover, the defendant is entitled to a verdict at the hands of the jury.

By "a preponderance of the evidence" is not meant the numerical strength of the witnesses either the one way or the other, but by that term is meant the greater weight and degree of credible evidence, and it is by this greater weight and degree of credible evidence that the plaintiff must establish his right to recover.

It is a part of the law of the case, and I so direct the jury, that the defendant in this case was not an insurer of the safety of any of its employes. We know by everyday observation and experience that there are certain hazards and dangers which are necessarily encountered in the managment of railroads by those in their employ, and those who enter the employment of a railroad are supposed to take the risk of those dangers and hazards which usually and necessarily attach to the employment in which they are engaged, and therefore the law has provided that railroads for such necessary and usual hazards are not to be considered as insurers of the safety of their employes, and I instruct you as a concrete proposition in this case that the Texas & Pacific Railway Company was not an insurer of the safety of the plaintiff. There were certain duties which it owed to him, and the failure to discharge which would constitute negligence. The measure of duty of the defendant to the plaintiff was that it would not, through any act of negligence on its part, cause him an injury. In other words, the defendant on the occasion in question owed to the plaintiff the duty of exercising ordinary care to prevent injury to him.

I will find it necessary in the course of these instructions frequently to use the terms "negligence" and "ordinary care," and in order that the jury may understand the legal meaning of those terms, the court will at this point give you the definition of the terms so employed.

"Negligence" means simply the want of ordinary care. Any act which shows that it was a failure to exercise ordinary care would in law be negligence.

"Ordinary care" is that degree of care which a person of ordinary prudence would have exercised under the circumstances of the situation. The care which a person must exercise is always proportionate to the danger which may be incurred and to the emergencies which may present themselves calling for the exercise of care, and must be just such care as a person of ordinary prudence at that time and under those circumstances would have exercised. Where a railroad company has on the occasion of an injury observed that degree of care which a person of ordinary prudence at that time and under those circumstances would have exercised, then it has fulfilled the measure of its duty and can not be held liable in damages, and this though an employe may have been injured while in the discharge of his duty to the company. Upon the other hand, where a railroad company has failed to exercise that degree of care for the safety of its employes which a person of ordinary prudence would have exercised under the circumstances, then it has failed to discharge the measure of its duty, and in such case such failure would become in law negligence. Whether the acts relied on by the plaintiff in this case constitute a failure to exercise ordinary care for his safety so as to make those acts negligence and entitle him to recover is a question of fact for the jury which must be determined by you alone from all the facts in evidence before you.

Two essential elements of the case which must be proven by the plaintiff by a preponderance of the evidence in order to entitle him to recover are, first, to show that he was injured, and second, to show that that injury was the direct and proximate result of the negligence of the defendant. Both of these elements are necessary in order to entitle the plaintiff to recover. The proof of one is as essential as the proof of the other. Although the jury in this case might believe that the plaintiff was injured ever so badly, that fact alone would not justify a recovery, because, in order

to be entitled to a verdict, the other element in the case must have been shown by a preponderance of the evidence that the injury which he suffered was the proximate and direct result of some act on the part of the defendant which showed a failure to exercise ordinary care for his safety. Upon the other hand, though the jury may find that the defendant was guilty of negligence, no recovery could be had unless you further find that the injury which followed was the direct and proximate result of that negligence.

The act of negligence alleged by the plaintiff in this case is that it was the duty of the defendant company to have the opening in the ice bunker on the car from which he fell covered, and that on the occasion of his injury the defendant company failed to discharge this duty, and left the opening uncovered, which caused him to step upon the casing of the bunker and thereby produced his fall to the ground. Though the jury might believe from the evidence before them that the ice bunker was uncovered, and that by reason of its being so uncovered the plaintiff stepped upon the casing and thereby caused his foot to turn or slip and threw him to the ground, that would not of itself be sufficient to justify a recovery at the hands of the plaintiff, but the jury would have to find further that the failure of the defendant company to have the ice bunker covered was a failure on the part of the defendant company to exercise ordinary care to prevent injury to its employes. In other words, though you might believe from the evidence that the plaintiff had proven a failure of the defendant company to discharge its duty in the particulars set out in the petition, and that such failure occasioned the injury, yet, in order to entitle the plaintiff to recover, the jury must, in addition to these facts, find from a preponderance of the evidence that the failure of the defendant company to discharge the duty as alleged in the petition was negligence on the part of the defendant company; that is, that it was a failure on the part of the defendant company to exercise that degree of care for the safety of its employes which a person of ordinary prudence would have exercised under the same circumstances. As

to whether the defendant company left the ice bunker uncovered on the occasion of the injury to the plaintiff, and as to whether the failure to so cover said ice bunker was the direct and proximate cause of the injury, and as to whether the failure to so cover the bunker was an act of negligence on the part of the defendant are all questions of fact to be decided by the jury, applying to the evidence before you the law which the court gives you in charge.

If the jury find from a preponderance of the evidence that on the occasion in question the plaintiff, M. J. Murphy, in the discharge of his duty as a switchman in the employ of the defendant, was upon a refrigerating car situated in the railroad yards of the defendant at Marshall, Texas; and if you further find that in going upon the top of the said refrigerating car in the discharge of said duty he stepped upon the casing of the ice bunker near the end of said car, and on account of stepping upon said casing his foot was caused to slip or turn, and by reason thereof he fell from the car and was injured; and if you further find from a preponderance of the evidence that the cover of the ice bunker on the casing of which plaintiff stepped was thrown back so as to leave the ice bunker open, and in such a condition that he plaintiff might step upon said casing; and if you further find from a preponderance of the evidence that the leaving of the covering of the ice bunker in the condition it was was a failure on the part of the defendant to exercise that degree of care which a person of ordinary prudence would have exercised under the same or similar circumstances, and was therefore negligence; and if you further find from a preponderance of the evidence that such negligence—that is, such failure to exercise ordinary care on the part of the defendant was the direct and proximate cause of the injury of which the plaintiff complains, then the plaintiff will be entitled to recover a verdict at your hands. Upon the other hand, if the jury fail to find such to be the case, the plaintiff will not be entitled to recover, even though you may find that he fell from the car and was injured. If the jury do not find by a preponderance of the evidence that the failure of the de-

fendant to have the cover of the ice bunker closed over the opening was the cause of the injury to the plaintiff; or if you find that the defendant company in failing to have the cover over the ice bunker closed did cause the injury to the plaintiff, but fail to find from a preponderance of the evidence that the condition of the opening to the ice bunker in having the cover thrown back was an act of negligence, in either event the plaintiff would not be entitled to recover. In other words, to entitle plaintiff to recover both propositions must appear from a preponderance of the evidence, viz: That the ice bunker was uncovered and thereby caused the plaintiff to slip and fall, and that the condition of the ice bunker at the time of the injury was an act of negligence on the part of defendant.

The defendant in this case has alleged that the plaintiff himself was guilty of negligence which contributed to his injury, and therefore it becomes my duty to instruct the jury on the meaning and legal effect of contributory negligence. "Contributory negligence" generally is some act of omission or commission on the part of a plaintiff which, concurring with some negligent act upon the part of a defendant, contributes to produce the injury of which a plaintiff complains. In this particular case on the occasion of the injury to the plaintiff it was the duty of the plaintiff to exercise ordinary care himself to prevent his injury, and should the jury find from the testimony before them that on the occasion of the injury the plaintiff failed to exercise ordinary care for his own safety, and that such failure on his part contributed to cause the injury of which he complains, then such failure to exercise ordinary care on the part of the plaintiff would be what the law calls contributory negligence. In determining what would be negligence upon the part of the plaintiff, and in determining the degree of care which plaintiff himself must exercise for his own safety, it would be the duty of the jury to take the same definitions and instructions with reference to negligence and ordinary care which I gave you in a former portion of the charge as applied to the acts of the defendant company.

That is, the plaintiff himself was compelled to use that degree of care for his own safety which a person of ordinary prudence would have exercised under the same circumstances just as the defendant was required to use ordinary care to avoid injury to the plaintiff. In case the jury should find that the plaintiff, M. J. Murphy, on the occasion of his injuries failed to exercise ordinary care for his own safety, and that such failure on his part contributed to produce his injury, it would be a case of contributory negligence on the part of the plaintiff. The rule of law was at one time that where a party was guilty of contributory negligence, if the party was an employe of a railroad company, such contributory negligence was an absolute bar to a recovery for an injury which might have been so occasioned; but that rule of law has been changed by statute in this state, and the rule now is that the fact that an employe may have been guilty of contributory negligence will not bar his recovery of damages for an injury which he received, but the damages shall be diminished by the jury in proportion of the amount of negligence attributable to such employe. The rule now is that where an employe of a railroad company and the railroad company are both guilty of negligence, that the consequences of such negligence shall be borne by each of them; that is, the employe will not be absolutely barred from a recovery, but he must bear such proportion of the results of his own negligence as are attributable to that negligence. If a railroad company and an employe both have failed to exercise ordinary care, the whole results of such failure shall fall upon neither one of them alone, but the results of the negligence shall be apportioned between them as the negligence of one is proportionate to the negligence of the other. So under this rule it will be the duty of the jury, should you find that the plaintiff is entitled to recover at all, to then determine whether the plaintiff himself was guilty of contributory negligence—that is, was there a failure on the part of the plaintiff on the occasion of his injury to exercise ordinary care for his own safety, and did such failure contribute to produce the injury of which he

complains? Now, you have it in evidence before you that the plaintiff was walking along the top of a car in proximity to the opening above the bunker. You also have it in evidence before you that the plaintiff at the time was carrying a lighted lantern in his hand, and it will be your duty to take into consideration these facts and all the other facts in evidence which bear upon the question as to whether the plaintiff himself did or did not exercise ordinary care for his own safety. A man may not simply walk recklessly into danger and after doing so claim the right to be compensated to the full amount of his injuries under the law as it now stands. but the jury should take all the evidence and facts before you and therefrom ascertain and decide whether at the time of the injury the plaintiff, M. J. Murphy, failed to do anything which a person of ordinary prudence would have done, and which failure on his part contributed to cause his injury, and if you should find from the evidence that the plaintiff was guilty of such contributory negligence either in doing something which a person of ordinary prudence would not have done, or failing to do something which a person of ordinary prudence would have done, then it would be the duty of the jury, should you find for the plaintiff, to diminish the damages which you would otherwise allow him in proportion to the amount of negligence so attributable to the plaintiff. If you find from the evidence before you that the plaintiff, M. J. Murphy, by the exercise of ordinary care on his part, could have seen the opening in the car and thereby avoided injury to himself, and that he failed to exercise such ordinary care, and such failure on his part contributed to produce his injury, then he will not be barred from the right to recovery absolutely, but the amount which you would otherwise find for him must under the law be diminished in proportion to such negligence on his part attributable to him. In thns connection, I further instruct you that, though the jury may find that the plaintiff was guilty of some act which contributed to his injuries, that fact alone would not in law be contributory negligence, and thereby diminish the amount of his recovery, un-

less the jury find that the plaintiff in doing that act failed to exercise ordinary care. Furthermore, though you may find that the plaintiff failed to do some act, which failure contributed to his injury, such failure on his part would not affect the right nor the amount of his recovery, unless you find that such failure on the part of the plaintiff was a failure to exercise ordinary care for his own safety, and therefore in law negligence on his part. As to whether the plaintiff was guilty of contributory negligence is a question of fact for the jury to decide, just as it is also within your province to determine whether the defendant company was guilty of negligence. If you determine from the evidence that the plaintiff under the law as applied to the facts is entitled to recover, and you further determine that the plaintiff under the law as applied to the facts was guilty of contributory negligence, it would be your duty in your sound judgment and discretion to decide how much of the negligence was attributable to the plaintiff, and when you reach the amount of damages you believe he would otherwise be entitled to recover, it would be your duty to diminish that amount of damages in proportion to the negligence so attributable to him, should you find he was guilty of contributory negligence.

It has been asserted in the pleadings, made an issue in the evidence and made the subject of comment in the argument that the refrigerating car in question was in the control and possession of a man named Marshall, and that this man left the opening uncovered, and that the defendant company knew nothing of Marshall's failure to cover the opening, and therefore is not responsible for Marshall's act in leaving it uncovered. Upon this phase of the case you are instructed that the defendant railroad company under the law can not escape liability for injuring the plaintiff by virtue of Marshall's act in leaving the opening above the bunker uncovered. In other words, though Marshall may have been the man who left the bunker uncovered, the mere fact that Marshall or some one acting for him left it uncovered would not be sufficient to defeat a recovery by the plaintiff,

but, while this is true, the jury can look to the fact of Marshall's control of the car in determining whether the defendant company on the occasion in question was guilty of negligence which directly and proximately contributed to the injury to the plaintiff, and you may also look to the fact of Marshall's control of the car, as well as the other facts in evidence, in determining whether the plaintiff was guilty of contributory negligence in walking along the car in the manner he did and at the time of the injury.

If under the instructions given to you in this charge as applied to the facts of the case you find for the plaintiff, the next duty which will devolve on the jury will be to determine the measure of damages which will be the sum of the verdict which you will return in favor of the plaintiff, should you find him entitled to recover. This duty of assessing the amount of the damages which the plaintiff is entitled to recover is a most delicate and responsible one for the jury, and one over which no man can exercise any control so far as your verdict is concerned. The court may be able to assist you in this phase of the case, should you reach it, in mentioning some things which it is proper for the jury to take into consideration in determining the amount of the recovery in this case, should you find for the plaintiff, and some things which ought not to be considered by the jury. It will not be proper for the jury in estimating the amount of the recovery to permit their sympathy to control or affect the finding in any particular. Every normal man can not help but sympathize with suffering and misfortune, but the place for sympathy is not in the jury boxes of the country so far as your action in rendering a verdict is concerned, and a verdict which would show in itself that it was the result of sympathy or passion would not be such a verdict as the law contemplates should be brought into court by a jury. The jury ought not to be guided by any desire to inflict punishment in a case like the one before you. Punishment is not a feature of the administration of the civil law. There are courts, and there are dockets in this court, where men can be punished, but in a civil case the jury is not

authorized to inflict penalties. So you must not be influenced by any natural and praiseworthy sympathy you might have for the plaintiff or any desire to inflict upon the defendant any penalty, nor ought the jury to be influenced by the wealth of the defendant or the poverty of the plaintiff. The wealth or poverty of the parties are not the criterions which should obtain in the assessment of damages in the trial of cases in the courts. Upon the other hand, there are certain elements which it is proper for the jury to consider in reaching the amount of the verdict which you are authorized to return, should you find for the plaintiff under the law and the facts. It would be proper for you to take into consideration the nature, character and extent of the injuries which you believe from the evidence the plaintiff has sustained as a direct and proximate result of the negligence of the defendant. It would be proper for you to take into consideration the age and earning power of the plaintiff, and all the other facts and circumstances which have been admitted in evidence before you, and from those facts and circumstances it will be the duty of the jury to determine in your own minds and consciences what would be a fair and reasonable compensation to allow the plaintiff in cash money paid at the present time for such injuries as you find he has sustained as the direct and proximate result of the negligence of the defendant company.

It has been contended in this case that the plaintiff is permanently injured, and that his future earning capacity has been greatly diminished or permanently destroyed. That will be a question of fact for the jury to determine from all the evidence before you, bearing in mind that so far as permanent injuries are concerned the jury would not be allowed to speculate upon that matter, but you would only have the right to compensate the plaintiff for permanent injuries where you find the evidence has shown with reasonable certainty that such injuries are permanent. If you find from the evidence with reasonable certainty that the plaintiff's injuries are permanent, then you may take into consideration any such permanent injuries in estimating the amount

of recovery which you believe the plaintiff is entitled to receive. You may take into consideration any physical or mental pain which the plaintiff has endured as a direct and proximate result of his injuries, and, as observed before, all the other facts and circumstances which the court has admitted in evidence before you, and from them make up the amount of recovery which you believe the plaintiff is entitled to receive.

You are the exclusive judges of the facts of the case, of the credibility of the witnesses and the weight to be given their testimony. You are the exclusive judges as to whether any given state of facts submitted to you constitute negligence. You are the exclusive judges as to whether the facts testified to in the trial constitute contributory negligence on the part of the plaintiff. You are the exclusive judges of the nature, character and extent of the injuries which you believe the plaintiff may have suffered, and it is the sole province of the jury to judge all of the evidence submitted to you in this case. As to the law, it is your duty under your oaths to be governed by the instructions of the court.

If you find for the plaintiff, and fail to find that the plaintiff was guilty of contributory negligence, the form of your verdict will be: "We, the jury, find for the plaintiff, and assess his damages at.....dollars," filling in the blank with the amount you find.

If you find for the plaintiff, and also find from the testimony before you that the plaintiff was guilty of contributory negligence which contributed to produce his injuries, then the form of your verdict will be: "We, the jury, find for the plaintiff and assess his damages at.....dollars, and we further find that the plaintiff was guilty of contributary negligence, and diminish the above amount by .....dollars," filling each blank with the amount you find.

If you find for the defendant, you will simply so state in your verdict.

You may select your own foreman and let your verdict be signed by the foreman so selected by yourselves.

GORDON RUSSELL, Judge.

It was admitted that on October 2, 1912, the moon rose at 9:30 p. m.

CHARGE OF THE COURT IN WRITING FILED WITH CLERK.

DEFENDANT HAD NOTED THE FOLLOWING EXCEPTIONS TO THE CHARGE:

1. To the refusal of the special instructions requested by defendant.

We except to the part of the charge which says that the jury may find negligence because the holes were left uncovered. It is repeated twice in the charge and we except to both places.

3. We except to the charge that plaintiff could recover, although he was guilty of contributory negligence.

4. We except to the charge stating that defendant would be responsible for Marshall's acts.

5. We except to the charge that the court gave on permanent injuries, because we don't think the evidence is sufficient to warrant a finding of permanent injuries.

Thereupon the Texas & Pacific Railway Company requested the Court to give the following special charges, each of which charges were refused by the Court and the Texas & Pacific Railway Company, then and there excepted to the Court's refusal to give each one of said charges, said charges being as follows:

1.

There is no evidence in this case showing any want of ordinary care on the part of the Railway Company that caused plaintiff to fall, you will therefore return a verdict for defendant.

2.

If the plaintiff with his lantern on top of the car could

have seen the hole in the top of the car was open by the exercise of ordinary care for his own safety, then he can not recover because his own want of care caused his injury.

3.

The Jury are charged: That the car from which the plaintiff fell was in charge of the man, Marshall, who had bananas in it that had been shipped over the railroad. And it appears that the holes in the top of the car were opened and left open by the man in charge of the bananas or by his authority, and were not opened by any person in the employ of the Railroad Company.

Therefore defendant would not be liable and you will find for defendant.

4.

It appears that plaintiff was caused to fall from the top of a box car called a refrigerator car by reason of the fact that holes in the top of the car were left open. The holes being used to put ice in the car.

Now if the holes were opened and left open by some one not in the employ of the Railway Company, and without any direction from the Railway Company to do so, then the Railway Company would not be liable.

5.

It appears from the evidence that the car of bananas was in the control of the man Marshall, at the time plaintiff was injured. Therefore the Railway Company is not responsible for the holes on the top being left open, you will therefore find for defendant.

6.

It appears that plaintiff knew the car of bananas was on the City Track, called the team track, to be unloaded, which knowledge informed him that it was not in the regular service of the Railway Company, and he was therefore informed that the man with the bananas had charge of the car, with authority to open and close the holes on top of the car, to put ice in and to regulate the temperature of the car.

7.

The Jury are charged:

That it has been proven in this case, that the car from which the plaintiff fell was a refrigerator car containing bananas, and said car was in charge of a messenger or custodian named Marshall. That under the rules of the Railway Company governing the transportation of bananas, the messenger in charge of the car had the right to open the ventilators on top of the car when he decided to do so.

Wherefore the fact that the ventilator was open when Murphy fell can not be held to be negligence on the part of the Railway Company.

8.

The Jury are charged:

That if Murphy did not get on the banana car to set the brakes on same, but got on it for some other purpose of his own, then it would not be negligence as to him, for the ventilators to be left open. And plaintiff can not recover on the ground that it was negligence in the Railway Company to leave the ventilators open.

9.

The Jury are charged:

The rules of the Railway Company governing the transportation of bananas in refrigerator cars are reasonable and binding on the parties; and if the car in question was handled in accordance with those rules, and if the messenger in charge of the car opened and left open the ventilators on the car, and if the ventilators being open caused the plaintiff to fall, then plaintiff can not recover.

10.

In this case the construction of the car from which plaintiff fell, and the construction of the openings in the top of the car have been shown to you without any contradiction, and that the brake wheel was at the west end of the car, and it appears that when Murphy got on the banana car he went about four or five feet east of the west end of the car.

Now the evidence shows that there was no need for him

to have gone that far east on the car to have set the brake on the car.

11.

The Jury are charged:

You are instructed that the plaintiff in his petition does not allege that he did not know that the ventilator door was open before he stepped on the ventilator door or casing, and you are therefore charged that you must consider that he knew that the door was open before he made the step, and if you find that he had known that the door was open and laid back, he could have, by the exercise of ordinary care, avoided falling and being injured, you will find for the defendant.

12.

The Jury are charged:

You are instructed that the undisputed evidence is that at the time the plaintiff was injured the defendant had adopted rules pertaining to refrigerator cars on its lines, and that said rules provided that the ventilation of all such cars should be under the direction and control of any messengers that might be in charge of them, and that the opening of the ventilator doors should be under the control of the messengers, and now you are charged that if you believe from the evidence that the said rules were reasonable for the operation of ventilator cars over the defendant's lines. you will find for the defendant.

13.

The Jury are charged:

If you find from the evidence that the plaintiff knew before he stepped on the door or casing of the ventilator that the ventilator door was open, you will find for the defendant.

14.

The Jury are charged:

If you find from the evidence that the plaintiff stepped on the ventilator door or casing, and slipped and fell, but you further find that the plaintiff knew that the ventilator was open and the door laid back before he stepped on the

ventilator door or casing, and that after so knowing the plaintiff could have, by the exercise of ordinary care avoided falling from the car and being injured, you will find for the defendant, whether the ventilator door was open by the defendant's negligence or not, because the ventilator door being thus open under the circumstances would not be the proximate cause of the injury.

15.

The Jury are charged:

The defendant had a right to presume that the plaintiff would exercise ordinary care for his safety while doing his work, and it was not necessary for the defendant or any of its agents to contemplate that the plaintiff would be guilty of a want of care and become injured as a result thereof, and the defendant had a right to presume that the plaintiff would take such notice of the construction of cars operated on its lines as would be taken by a person of ordinary care and caution under the same circumstances, and would take such notice of the manner in which the cars on its line were used:

Now, if you find from the evidence that it was a business of the defendant to operate refrigerator cars over its line, and that it also made the business of allowing messengers to accompany such cars at times, and that the messengers had full control of the use of the ventilator doors, and that the employes of the defendant had knowledge or information that the messengers had charge of the use of these ventilator doors, the defendant would have a right to presume that the plaintiff and other employes of his class would take notice of the construction of such refrigerator cars and the use of the ventilator doors, and take notice that the doors might be open and laid back, if they should be open and laid back, and if you so find, you will return a verdict for the defendant.

16.

If you find from the evidence that the plaintiff knew that it was the rule or practice of the defendant company to allow messengers in charge of refrigerator cars to exercise

control over the manner in which the ventilator doors were left open, it would then be the duty of the plaintiff to look out for wide open doors on refrigerator cars situated as this one was, and if you so find you will return a verdict for the defendant.

17.

You are instructed that the undisputed evidence in this case shows that he plaintiff did not fall into the ventilator hole in the car, but that he fell off of the car, therefore you are charged to not consider whether or not the defendant would be guilty of negligence toward an employe in the plaintiff's class who might fall into the open ventilator by the ventilator being left open, but before you can find that the defendant was negligent in this case you must find by a preponderance of the evidence that a person of ordinary care, situated as the defendant was, could have reasonably foreseen that a switchman on top of the car while it was standing might slip on laid back door and fall from the car, and if you fail to so find you will return a verdict for the defendant.

18.

If you find from the evidence that the plaintiff stepped on the ventilator door and casing but that before he stepped on them he knew that the said door was open and laid back, and knew the dangers arising therefrom, or that, in the exercise of ordinary care for his own safety, he must necessarily have known that the said door was open and laid back, and must necessarily have known the dangers arising therefrom, you will find for the defendant.

Thereupon the jury retired and after consideration returned into court a verdict in favor of the plaintiff for $12,000.00, and the court entered judgment accordingly.

Upon the defendant's application, the court entered an order granting the defendant forty-two days' time to prepare and present its petition for a new trial and stayed execution until that time.

The court also ordered the cause retained for the pur-

pose of permitting the party to prepare and present bills of exception for a writ of error in the case.

On agreement of the parties the time was further extended to January 15, 1914, and by agreement of parties the time was further extended to February 24, 1914.

The court denies a motion for a new trial and approved the above as a Bill of Exceptions in the cause.

The clerk will send up with the Record the photographs of the car used in evidence.

GORDON RUSSELL, Judge.

Filed in U.S. District Court E.D.T. at Jefferson Feb 19th 1914.

CLERK'S CERTIFICATE.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT JEFFERSON.

No.....

I, J. R. Blades, Clerk of the District Court of the United States for the Eastern District of Texas, at Jefferson, do hereby certify that the foregoing and attached papers of manuscript numbered in the margin of said pages (from 1 to.....both inclusive) contain a full, true and correct copy of the record, bill of exceptions, assignment of errors, and all the proceedings in the cause No. 596, wherein the Texas & Pacific Railway Company are plaintiffs in error, and M. J. Murphy is defendant, except that the original writ of error and citation in error are included therein, instead of copies thereof, as fully as the same remains in file and record in my office at Jefferson, Texas.

In testimony whereof I hereunto set my hand and affix the seal of the District Court of the United States of America for the Eastern District of Texas, at Jefferson, at my office in said City of Jefferson, this the 10th day of April, A. D. 1914. J. R. BLADES,

Clerk of the United States District Court, Eastern District of Texas, at Jefferson, Texas.

By W. E. SINGLETON,

Deputy.

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of November 16, 1915.

No. 2639.

TEXAS & PACIFIC RAILWAY COMPANY
versus
M. J. MURPHY.

On this day this cause was called, and, after argument by F. H. Prendergast, Esq., for plaintiff in error, and S. P. Jones, Esq., for defendant in error, was submitted to the Court.

Opinion of the Court.

Filed December 14th, 1914.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2639.

TEXAS & PACIFIC RAILWAY COMPANY
v.
M. J. MURPHY.

Error to the United States District Court for the Eastern District of Texas.

Before Pardee and Walker, Circuit Judges, and Call, District Judge.

By the COURT:

We find none of the assignments of error well taken.
Judgment Affirmed.

Judgment.

Extract from the Minutes of December 14th, 1914.

No. 2639.

TEXAS & PACIFIC RAILWAY COMPANY
versus
M. J. MURPHY.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiff in error, The Texas & Pacific Railway Company, and the sureties on the writ of error bond herein, J. H. Ardrey and E. R. Buddy, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

Petition for Writ of Error, Order Allowing Same, and Assignment of Errors.

Filed January 13th, 1915.

In the United States Circuit Court of Appeals, Fifth Circuit.

In the United States Supreme Court:

Now comes the Texas & Pacific Railway Company and shows to the Court that heretofore, to-wit, on the 14th day of December, 1914, the United States Circuit Court of Appeals entered a judgment in favor of M. J. Murphy and against the Texas & Pacific Railway Company, affirming a judgment that had been heretofore rendered in the United States District Court for the Eastern District of Texas, in favor of M. J. Murphy and against the Texas & Pacific Railway Company, for the sum of Twelve Thousand Dollars, and the proceedings in said cause in the rendition of said judgment, manifest error hath happened to the damage of the Texas & Pacific Railway Company, as is shown by the following assignments of error:

First.

The Court erred in refusing to sustain the first error assigned, which is as follows:

"There is no evidence in this case showing any want of ordinary care on the part of the Railway Company that caused plaintiff to fall, you will therefore return a verdict for defendant."

Second.

The Court erred in refusing to sustain the second error assigned, which is as follows:

"The Jury are charged:

"If the plaintiff with his lantern on top of the car could have seen the hole in the top of the car was open by the exercise of ordinary care for his own safety, then he cannot recover because his own want of care caused his injury."

Third.

The Court erred in refusing to sustain the third assigned error, which is as follows:

"The Jury are charged:

That the car from which the plaintiff fell was in charge of the man, Marshall, who had bananas in it that had been shipped over the railroad and it appears that the holes in the top of the car were opened and left open by the man in charge of the bananas or by his authority, and were not opened by any person in the employ of the Railroad Company.

Therefore defendant would not be liable and you will find for the defendant.

Fourth.

The Court erred in refusing to sustain the fourth assigned error, which is as follows:

"It appears that plaintiff was caused to fall from the top of a box car called a refrigerator car by reason of the fact that holes in the top of the car were left open. The holes being used to put ice in the car. Now if the holes were opened and left open by some one not in the employ of the Railway Company, and without any direction from the Railway Company to do so, then the Railway Company would not be liable."

Fifth.

The Court erred in refusing to sustain the fifth assigned error, which is as follows:

"It appears from the evidence that the car of bananas was in control of the man, Marshall, at the time plaintiff was injured. Therefore, the Railway Company is not responsible for the holes on top being left open, you will therefore find for the defendant."

Sixth.

The Court erred in refusing to sustain the sixth assigned error, which is as follows:

It appears that plaintiff knew the car of bananas was on the City track, called the team track, to be unloaded, which knowledge informed him that it was not in the regular service of the Railway Company, and he was therefore informed that the man with the bananas had charge of the car, with authority to open and close the holes on top of the car, to put ice in and to regulate the temperature of the car."

Seventh.

The Court erred in refusing to sustain the seventh error assigned, which is as follows:

"The Jury are charged:

That it has been proven in this case, that the car from which the plaintiff fell was a refrigerator car containing bananas, and said car was in charge of a messenger or custodian named Marshall. That under the rules of the Railroad Company governing the transportation of bananas, the messenger in charge of the car had the right to open the ventilators on top of the car when he decided to do so.

Wherefore the fact that the ventilator was open when Murphy fell cannot be held to be negligence on the part of the Railway Company."

Eighth.

The Court erred in refusing to sustain the eighth error assigned, which is as follows:

"The Jury are charged:

That if Murphy did not get on the banana car to set the brakes on same, but got on it for some other purpose of his own, then it would not be negligence as to him, for the ventilators to be left open. And the plaintiff cannot recover on the ground that it was negligence in the Railway Company to leave the ventilators open."

Ninth.

The Court erred in refusing to sustain the ninth error assigned, which is as follows:

"The Jury are charged:

The rules of the Railway Company governing the transportation of bananas in refrigerator cars are reasonable and binding on the parties; and if the car in question was handled in accordance with these rules, and if the messenger in charge of the car opened and left open the ventilators on the car, and if the ventilators being open caused the plaintiff to fall, then plaintiff cannot recover."

Tenth.

The Court erred in refusing to sustain the tenth error assigned, which is as follows:

"In this case the construction of the car from which plaintiff fell, and the construction of the openings in the top of the car, have been shown to you without any contradiction, and that the brake wheel was at the west end of the car, and it appears that when Murphy got on the banana car he went about four or five feet east of the west end of the car.

Now the evidence shows that there was no need for him to have gone that far east on the car to have set the brake on the car."

Eleventh.

The Court erred in refusing to sustain the eleventh assigned error, which is as follows:

"The Jury are charged:

You are instructed that the plaintiff in his petition does not allege that he did not know that the ventilator door was open before he stepped on the ventilator door or casing, and you are therefore charged that you must consider that he knew that the door was open before he made the step, and if you find that he had known that the door was open and laid back, he could have, by the exercise of ordinary care, avoided falling and being injured, you will find for the defendant."

Twelfth.

The Court erred in refusing to sustain the twelfth error assigned, which is as follows:

"The Jury are charged.

"You are instructed that the undisputed evidence is that at the time the plaintiff was injured the defendant had adopted rules pertaining to refrigerator cars on its lines, and that said rules provided that the ventilation of all such cars should be under the direction and control of any messengers that might be in charge of them, and that the opening of the ventilator doors should be under the control of the messengers, and now you are charged that if you believe from the evidence that the said rules were reasonable for the operation of ventilator cars over the defendant's lines, you will find for the defendants."

Thirteenth.

The Court erred in refusing to sustain the thirteenth assigned error, which is as follows:

"The Jury are charged:

"If you find from the evidence that the plaintiff knew before he stepped on the door or casing of the ventilator that the ventilator door was open, you will find for the defendant."

Fourteenth.

The Court erred in refusing to sustain the fourteenth assigned error, which is as follows:

"The Jury are charged:

"If you find from the evidence that the plaintiff stepped on the ventilator door or casing, and slipped and fell, but you further find that the plaintiff knew that the ventilator was open and the door laid back before he stepped on the ventilator door or casing, and that after so knowing the plaintiff could have by the exercise of ordinary care avoided falling from the car and being injured, you will find for the defendant, whether the ventilator door was open by the defendant's negligence or not, because the ventilator door being thus open under the circumstances would not be the proximate cause of the injury."

Fifteenth.

The Court erred in refusing to sustain the fifteenth assigned error, which is as follows:

"The Jury are charged:

"The defendant had a right to presume that the plaintiff would exercise ordinary care for his safety while doing his work, and it was not necessary for the defendant, or any of its agents to contemplate that the plaintiff would be guilty of a want of care and become injured as a result thereof, and the defendant had a right to presume that the plaintiff would take such notice of the construction of cars operated on its lines as would be taken by a person of ordinary care and caution under the same circumstances, and it would take such notice of the manner in which the cars on its lines were used.

Now, if you find from the evidence that it was a business of the defendant to operate refrigerator cars over its line, and that it also made the business of allowing messengers to accompany such cars at

times, and that the messengers had full control of the use of the ventilator doors, and that the employes of the defendant had knowledge or information that the messengers had charge of the use of these ventilator doors, the defendant would have a right to presume that the plaintiff and other employes of his class would take notice of the construction of such refrigerator cars and the use of the ventilator doors, and take notice that the doors might be open here and laid back, you will return a verdict for the defendant."

Sixteenth.

The Court erred in refusing to sustain the sixteenth assigned error, which is as follows:

"If you find from the evidence that the plaintiff knew that it was the rule or practice of the defendant company to allow messengers in charge of refrigerator cars to exercise control over the manner in which the ventilator doors were left open it would then be the duty of the plaintiff to look out for wide open doors on refrigerator cars situated as this one was, and if you so find you will return a verdict for the defendant."

Seventeenth.

The Court erred in refusing to sustain the seventeenth assigned error, which is as follows:

"If you find from the evidence that the plaintiff stepped on the ventilator door and casing, but that before he stepped on them, he knew that the said door was open and laid back, and knew the dangers arising therefrom, or that, in the exercise of ordinary care for his own safety, he must necessarily have known that the said door was open and laid back, and must necessarily have known the dangers arising therefrom, you will find for the defendant."

Eighteenth.

The Court erred in refusing to sustain the eighteenth assigned error, which is as follows:

"It had been asserted in the pleadings and made an issue in the evidence that the refrigerator car in question was in the control and possession of a man named Marshall, and that this man left the opening uncovered and that the defendant Company knew nothing of Marshall's failure to cover the opening and therefore is not responsible for Marshall's act in leaving it uncovered. Upon this phase of the case you are instructed that the defendant Railroad Company under the law can not escape liability for injuring the plaintiff by virtue of Marshall's act in leaving the opening above the bunker uncovered. In other words though Marshall may have been the man who left the bunker uncovered, the mere fact that Marshall or some one acting for him left it uncovered, would not be sufficient to defeat a recovery by the plaintiff, but while this is true the Jury can look to the fact of Marshall's control of the car in determining whether the defendant Company on the occasion in question was guilty of negligence which directly and proximately

contributed to the injury of the plaintiff, and you may also look to the fact of Marshall's control of the car as well as the other facts in evidence in determining whether the plaintiff was guilty of contributory negligence in walking along the car in the manner he did and at the time of the injury."

Nineteenth.

The Court erred in refusing to sustain the Nineteenth assigned error:

"The court in charging the Jury as follows after charging that if the plaintiff stepped on the casing of the ice box and fell, "And you further find from a preponderance of the evidence that the cover of the ice bunker on the casing of which plaintiff stepped was thrown back so as to leave the ice bunker open and in such a condition that the plaintiff might step upon said casing and if you further find from a preponderance of the evidence that the leaving of the covering of the ice bunker in the condition it was was a failure on the part of the defendant to exercise that degree of care which a person of ordinary prudence would have exercised under the same or similar circumstances and was therefore negligence;" and was the proximate cause of the injury to find for the plaintiff.

This was error because the facts of the case would not support a finding that the Railway Company was negligent in leaving the cover off the ice box."

Wherefore the Texas & Pacific Railway Company prays for a writ of error to bring said cause to the United States Supreme Court that said errors may be therein reviewed and corrected, and prays that the writ of error be allowed and supersedeas bond *a*ffixed at Ten Thousand Dollars, and that the judgment be reversed.

(Signed) F. H. PRENDERGAST,
Attorney for Plaintiff in Error,
The Texas & Pacific Ry. Co.

Allowed Jan'y 13th, 1915.
(Signed) DON A. PARDEE,
Circuit Judge.

Bond on Writ of Error.

Filed January 13th, 1915.

In the United States Circuit Court of Appeals for the Fifth Circuit.

THE TEXAS & PACIFIC RAILWAY CO., Plaintiff in Error,
vs.
M. J. MURPHY, Defendant in Error.

Know all men by these presents, That we, The Texas & Pacific Railway Company, a corporation duly incorporated and organized under and by virtue of an Act of Congress of the United States, as

principal, and J. H. Ardrey and E. R. Buddy, as sureties, are held and firmly bound unto M. J. Murphy, in the sum of Ten Thousand Dollars, to be paid to the said M. J. Murphy, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents, sealed with out seals, using scrolls for seals, and signed with our names, this the 13th day of January, 1915.

The condition of the foregoing bond is such that, whereas, lately at a term of the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, in a suit pending in said Court between The Texas & Pacific Railway Company, plaintiff in error, and M. J. Murphy, defendant in error, a judgment was rendered on the 14th day of December, 1914, affirming a judgment rendered in said cause on the 11th day of October, 1913, for the sum of Twelve Thousand Dollars with 6% interest thereon from date of judgment.

And whereas, the said Texas & Pacific Railway Company has obtained a writ of error and has filed a copy thereof in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, to reverse said judgment, and has also obtained a citation directed to the said M. J. Murphy and his attorney of Record, S. P. Jones, citing and admonishing him to appear in the Supreme Court of the United States in the city of Washington, District of Columbia, within thirty days from the date thereof.

Now if the said Texas & Pacific Railway Company shall prosecute its writ of error to effect, and answer all damages and costs, if it fail to make good its plea, then the above obligations to be void, otherwise to remain in full force and virtue.

Witness our hands this 7th day of January, 1915.

(Signed) THE TEXAS AND PACIFIC RAILWAY COMPANY,
By GEORGE THOMPSON, *Its Attorney.*
J. H. ARDREY.
E. R. BUDDY.

Bond approved Jan'y 13th, 1915.
(Signed) DON A. PARDEE,
Circuit Judge.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 89 to 100 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, num-

bered 2639, wherein Texas & Pacific Railway Company is plaintiff in error, and M. J. Murphy is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 88 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 16th day of January, A. D. 1915.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

The President of the United States to the Honorable Judges of the United States Circuit Court of Appeals, Fifth Circuit:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Court, before you, or some of you, between The Texas and Pacific Railway Company, plaintiff in error, and M. J. Murphy, defendant in error, a manifest error hath happened, to the great damage of the said Texas and Pacific Railway Company, plaintiff in error as by its complaint appears; said judgment rendered on December 14th, A. D. 1914, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at Washington, *in said circuit,* in not exceeding thirty days from the 13 day of January, 1915, the date of issuance of the citation herein, in the said United States Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 13" day of January, in the year of our Lord one thousand nine hundred and Fifteen.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

Allowed by

DON A. PARDEE,
United States Circuit Judge.

I hereby certify that a true copy of the within writ has this day been lodged in the Clerk's office for the use of the defendant in error.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

Dated this 13th day of January, 1915.

[Endorsed:] No. 2639. In the United States Circuit Court of Appeals, Fifth Circuit. The Texas & Pacific Railway Co., Plaintiff in Error, versus M. J. Murphy, Defendant in Error. Writ of Error. U. S. Circuit Court of Appeals. Filed Jan. 13, 1915. Frank H. Mortimer, Clerk.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

The President of the United States to M. J. Murphy or S. P. Jones, his attorney, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be held at the City of Washington, *in said circuit*, within thirty days from the date of this writ, pursuant to a Writ of Error filed in the Clerk's office of the Circuit Court of Appeals for Fifth Circuit, wherein the Texas and Pacific Railway Company is plaintiff in error and M. J. Murphy is defendant in error, to show cause, if any there be, why the judgment rendered against said Texas and Pacific Railway ompany, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 13th day of January, A. D. 1915, and of the independence of the United States the one hundred and — year.

DON A. PARDEE,
United States Judge.

I accept service of the within Citation in Error on this — ——, 191–.

S. P. JONES,
Attorney for M. J. Murphy, Defendant in Error.

Citation filed —.

—— ——, *Clerk,*
By —— ——, *Deputy.*

[Endorsed:] 2639. In the United States Circuit Court of Appeals, Fifth Circuit. Texas & Pacific Railway Company, Plaintiff in Error, versus M. J. Murphy. Citation and Acceptance of Service. U. S. Circuit Court of Appeals. Filed Jan. 13, 1915. Frank H. Mortimer, Clerk.

Endorsed on cover: File No. 24,535. U. S. Circuit Court Appeals, 5th Circuit. Term No. 791. The Texas & Pacific Railway Company, plaintiff in error, vs. M. J. Murphy. Filed January 26th, 1915. File No. 24,535.

No. 791

IN THE UNITED STATES SUPREME COURT

THE TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

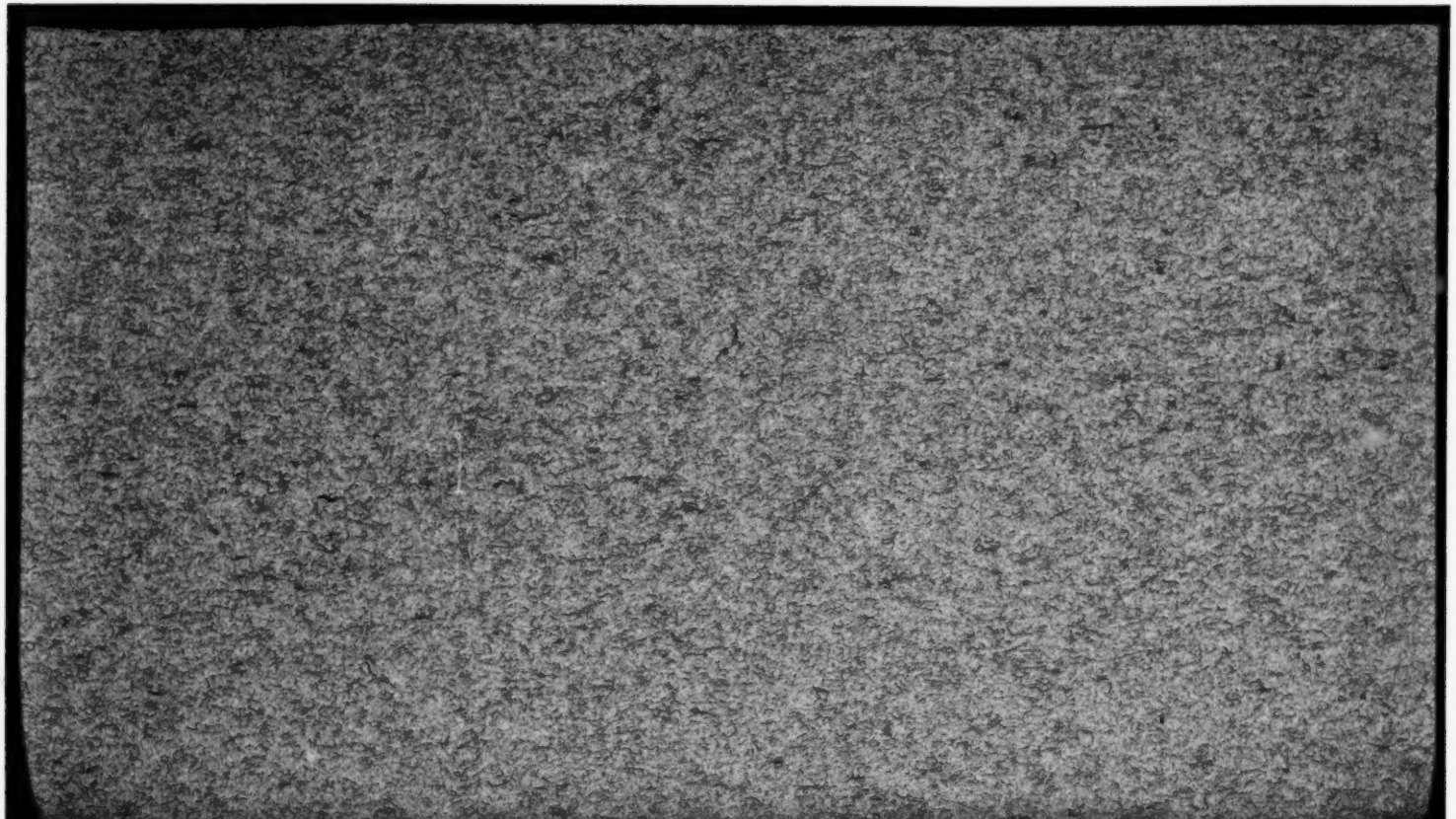
vs.

M. J. MURPHY,
Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE PLAINTIFF IN ERROR.

By F. H. PRENDERGAST, Attorney,
Marshall, Texas.



THE TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error.
vs.
M. J. MURPHY,
Defendant in Error.

INDEX TO BRIEF OF PLAINTIFF IN ERROR.

First.

Where a car loaded with bananas was in charge of a custodian, and had been placed on a bulk track to be unloaded then the shipping rules of the Railroad which permitted the custodian to open or close the ventilators to the car, are valid and the Railroad would not be liable for an injury caused by the custodian having the ventilators open on top of the car.

Second.

The facts proven established the fact that Murphy did not get on the car to set the brakes nor to perform any duty he owed the Railroad, because he had gone five or six feet beyond the brake staff before he fell, and our eighth and tenth special charges should have been given. (Fourth and Sixth Error Assigned).

Third.

If Marshall, the man in charge of the bananas, left the opening on top of the car uncovered, then the Railroad Company would not be liable and the Court erred in its charge to the Jury.

No. 791

IN THE UNITED STATES SUPREME COURT

THE TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

M. J. MURPHY,
Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE PLAINTIFF IN ERROR.

By F. H. PRENDERGAST, Attorney,
Marshall, Texas.

In this case, M. J. Murphy recovered a judgment against the Texas & Pacific Railway Company for $12,000.00 for damages on account of personal injury received by him

while working for the Texas & Pacific Railway Company, on the 2nd of September, 1912, at Marshall, Texas. Judgment was rendered in the United States District Court at Jefferson.

The Railway Company carried the cause, by writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, which Court affirmed the judgment below without delivering any written opinion. The Railway Company now brings the cause to this Court by writ of error in January, 1915, assigning the same errors that were assigned in the Circuit Court of Appeals.

The Defendant in Error has served notice of his intention to move, on the first Monday in March, 1915, to affirm the judgment, or dismiss the appeal because the questions involved in the case are frivolous and do not require further examination. He has coupled with that motion, a motion to place the cause on the summary docket.

The Plaintiff in Error raises no objection to the cause being placed on the summary docket, but does object to the appeal being dismissed, or the judgment being affirmed, on the ground that the questions involved are frivolous.

We recognize that this Court has established the rule that in this character of case this Court will not do more than examine the cause to see if there is plain error, and the practice is that if plain error does not appear the judgment below will be affirmed.

We confess our inability to understand just what is meant by plain error, and to understand what is the difference between error and plain error, as the same may appear in the Transcript on Appeal.

Plaintiff in Error deems that it is its duty to present on this motion, the questions involved, urging upon this Court that instead of dismissing the cause because the questions are frivolous, that it set the cause down for future argument, and we think, upon a full examination, there will be shown error sufficiently grave and important to call for a reversal of the judgment.

The circumstances of Murphy's injury were as follows:

Murphy was employed as a switchman in the Railroad yards at Marshall, Texas, belonging to the Texas & Pacific Railway Company, and on the second day of September, 1912, he fell from the top of a refrigerator car and was injured. The circumstances of his injury are about as follows: In the Railway yard at Marshall the main line runs through the yard from east to west. On the north side of the main line there are a large number of tracks and the shops of the Company. On the south side of the main line there are two or three tracks, and the track farthest south near the west end of the yard is a spur track, called sometimes bulk track, city track, or team track, being the track from which bulk freight is unloaded into wagons to be distributed in the city. Two or three days before plaintiff was injured, a refrigerator car containing bananas and in charge of a man named W. M. Marshall, was placed on this team track to permit the man in charge to unload the bananas and sell them throughout the city. The banana car has compartments in it for fruit, and at each end it has compartments wherein ice is placed to preserve the fruit. This ice is placed in the car through openings in the roof at the ends of the car, said openings being about two feet square and covered with a door that works on hinges. The plaintiff's duties called him to work at night, and he was engaged in switching cars in connection with the switch engine from one part of the yard to another. During the night time the engine had occasion to place some cars in on this team track —the team track joining the main line west of where the injury occurred. When the engine pushed some cars in on to this team track Murphy was on top of the cars, they being box cars where his duty required him to be. These cars were pushed up against the banana car which was already in, then stepped over on to the banana car, as he claims with a view to seeing whether the brake on that car was set; the defendant claims that he had no duties that called him on the banana car. The door leading down to the ice bunker

was open and thrown back on the top of the car (as shown on page 4 of the transcript). Murphy was going east when he stepped on to the banana car and the figures 1, 2, 3 and 4 on the plat show his first, second, third and fourth step; his fourth step being on the casing of the ice bunker caused him to slip and fall. (The circle at the west end of the car shows the brake staff that Murphy claims he went on the car for the purpose of setting). By reason of his fall from the car he was severely injured.

Plaintiff asserts that it was negligence in the Railroad Company to leave the ice bunker open which made it dangerous for the switchman working as Murphy was. Murphy had a lantern in his hand at the time, which was trimmed and burning. The defendant claims that banana car was in charge of and under control of Marshall, who had the bananas for sale, and that under the rules governing the transportation of bananas, Marshall had a right to have the openings open or closed at his pleasure.

Case was tried on October 9, 1913, and verdict and judgment for Twelve Thousand ($12,000.00)) Dollars in favor of plaintiff. The Railway Company's attack on the judgment is made by special requested charges to the jury and objections to charges given by the Court, the principal contention is that no negligence can be charged against the Railway Company on account of the ice bunker being left open because under the rules governing the transportation of such freight that matter was under control of the man in charge of the bananas and this was a reasonable regulation. One of the most important rules is as follows:

"Bananas are not ordinarily transported under refrigeration and should not be iced or re-iced without specific authority on billing or from owner or his representatives. (See Item 137; Transferring). When iced or re-iced it is not safe to close all ice hatches as this would be apt to chill the bananas which are more liable to damage by chilling them than other fruits and vegetables. Bananas are usually accompanied by messengers in charge whose custom it is

when such cars are iced, to leave ventilators open and plugs out, at least one end thus allowing cold air to escape."

The assignments of error presented here are as follows:

First.

The Court erred in refusing special charge No. 3 requested by the defendant, which charge is as follows:

"The Jury are charged:

"That the car from which the plaintiff fell was in charge of the man, Marshall, who had bananas in it that had been shipped over the railroad and it appears that the holes in the top of the car were open and left open by the man in charge of the bananas or by his authority, and were not opened by any person in the employ of the Railway Company.

"Therefore defendant would not be liable and you will find for the defendant."

Second.

The Court erred in refusing special charge No. 4 requested by the defendant, which charge is as follows:

"It appears that plaintiff was caused to fall from the top of a box car called a refrigerator car by reason of the fact that holes in the top of the car were left open. The holes being used to put ice in the car. Now if the holes were opened and left open by some one not in the employ of the Railway Company, and without any direction from the Railway Company to do so, then the Railway Company would not be liable."

Third.

The Court erred in refusing special charge No. 6 requested by the defendant, which charge is as follows:

"It appears that plaintiff knew the car of bananas was on the City Track, called the team track to

be unloaded, which knowledge informed him that it was not in the regular service of the Railway Company, and he was therefore informed that the man with the bananas had charge of the car, with authority to open and close the holes on top of the car, to put ice in and to regulate the temperature of the car."

Fourth.

The Court erred in refusing special charge No. 8 requested by the defendant, which charge is as follows:

"The Jury are charged:

"That if Murphy did not get on the banana car to set the brakes on same, but got on it for some other purpose of his own, then it would not be negligence as to him, for the ventilators to be left open. And plaintiff can not recover on the ground that it was negligence in the Railway Company to leave the ventilators open."

Fifth.

The Court erred in refusing special charge No. 9 requested by the defendant, which charge is as follows:

"The Jury are charged:

"The rules of the Railway Company governing the transportation of bananas in refrigerator cars are reasonable and binding on the parties; and if the car in question was handled in accordance with these rules, and if the messenger in charge of the car opened and left open the ventilators on the car, and if the ventilators being open caused the plaintiff to fall, then plaintiff can not recover."

Sixth.

The Court erred in refusing special charge No. 10 requested by the defendant, which charge is as follows:

"In this case the construction of the car from

which plaintiff fell, and the construction of the openings in the top of the car have been shown to you without any contradiction, and that the brake wheel was at the west end of the car, and it appears that when Murphy got on the banana car he went about four or five feet east of the west end of the car.

"Now the evidence shows that there was no need for him to have gone that far east on the car to have set the brake on the car."

Seventh.

The Court erred in refusing special charge No. 15, requested by the defendant, which charge is as follows:

"The Jury are charged:

"The defendant had a right to presume that the plaintiff would exercise ordinary care for his safety while doing his work, and it was not necessary for the defendant, or any of its agents to contemplate that the plaintiff would be guilty of a want of care and become injured as a result thereof, and the defendant had a right to presume that the plaintiff would take such notice of the construction of cars operated on its lines as would be taken by a person of ordinary care and caution under the same circumstances, and it would take such notice of the manner in which the cars on its line were used.

"Now, if you find from the evidence that it was a business of the defendant to operate refrigerator cars over its line, and that it also made the business allowing messengers to accompany such cars at times, and that the messengers had full control of the use of the ventilator doors, and that the employes of the defendant had knowledge or information that the messengers had charge of the use of these ventilator doors, the defendant would have a right to presume that the plaintiff and other em-

ployes of his class would take notice of the construction of such refrigerator cars and the use of the ventilator doors, and take notice that the doors might be open and laid back, if they should be open and laid back, and if you so find, you will return a verdict for the defendant."

Eighth

The Court erred in refusing special charge No. 16, requested by the defendant, which charge is as follows:

"If you find from the evidence that the plaintiff knew that it was the rule or practice of the defendant company to allow messengers in charge of refrigerator cars to exercise control over the manner in which the ventilator doors were left open, it would then be the duty of the plaintiff to look out for wide open doors on refrigerator cars situated as this one was, and if you so find you will return a verdict for the defendant."

Ninth.

The Court erred in charging the jury as follows:

"It has been asserted in the pleadings and made an issue in the evidence that the refrigerator car in question was in the control and possession of a man named Marshall and that this man left the opening uncovered and that the defendant company knew nothing of Marshall's failure to cover the opening and therefore is not responsible for Marshall's act in leaving it uncovered. Upon this phase of the case you are instructed that the defendant Railroad Company under the law can not escape liability for injuring the plaintiff by virtue of Marshall's act in leaving the opening above the bunker uncovered. In other words though Marshall may have been the man who left the bunker uncovered the mere fact that Marshall or some one acting for him left it uncovered would not be sufficient to de-

feat a recovery by the plaintiff, but while this is true the jury can look to the fact of Marshall's control of the car in determining whether the defendant company on the occasion in question was guilty of negligence which directly and proximately contributed to the injury of the plaintiff, and you may also look to the fact of Marshall's control of the car as well as the other facts in evidence in determining whether the plaintiff was guilty of contributory negligence in walking along the car in the manner he did and at the time of the injury."

Tenth.

The Court erred in charging the jury as follows after charging that if plaintiff stepped on the casing of the ice box and fell: "And you further find from a preponderance of the evidence that the cover of the ice bunker on the casing of which plaintiff stepped was thrown back so as to leave the ice bunker open and in such a condition that the plaintiff might step upon said casing and if you further find from a preponderance of the evidence that the leaving of the covering of the ice bunker in the condition it was, was a failure on the part of the defendant to exercise that degree of care which a person of ordinary prudence would have exercised under the same or similar circumstances and was therefore negligence." And was the proximate cause of the injury to find for the plaintiff."

This was error because the facts of the case would not support a finding that the Railway Company was negligent in leaving the cover off the ice box.

Eleventh.

The Court erred in charging the jury as follows:

"It has been asserted in the pleadings, made an issue in the evidence and made the subject of comment in the argument that the refrigerating car

in question was in the control and possession of a man named Marshall, and that this man left the opening uncovered, and that the defendant company knew nothing of Marshall's failure to cover the opening, and therefore is not responsible for Marshall's act in leaving it uncovered. Upon this phase of the case you are instructed that the defendant Railroad Company under the law can not escape liability for injuring the plaintiff by virtue of bunker uncovered. In other words, though Marshall may have been the man who left the bunker uncovered, the mere fact that Marshall or some one acting for him left it uncovered would not be sufficient to defeat a recovery by the plaintiff."

The Court charged the Jury as above set out (Rec. 77) and the defendant excepted to that part of the Court's charge. (Rec. 81). The evidence without substantial contradiction showed that this was a car of bananas which started on its journey from Galveston, Texas, and that W. M. Marshall was put in charge of the car. He testified: "We take charge of the cars all the time leaving Galveston. I just keep charge of the car until I get through with it. I am there for that purpose to look after the fruit. I have that control of the car and they never did stop me. I don't know who I sent up there to look after the ventilators before the plaintiff was hurt. I usually send some one to raise the ventilators. Cars are placed where I can get to them with wagons and unload the bananas and distribute them in town. We peddle the bananas out through the town. I had a car placed there where we could get to it with wagons. I have charge of the cars, and open or close the ice bunkers, or have a man that is with me to do it. If the car gets too hot we open the vents on top and open the side doors of the car so as to ventilate it. When we have ice we close the doors to keep the ice from melting and keep the car cool. If it gets too cool we close the car, and too hot

we open it. I had some of the boys employed by me to open the ventilators the night plaintiff was injured. I had ordered them opened." (Rec. 62, 63).

Murphy, the plaintiff, testified that the spur track on which the banana car was situated, joined on to the main line at the west end of the yard and then runs southeast. The engine had gone up west on the main line and pushed several cars in on the track where the banana car was stationed; and pushed them up against the banana car. These were the box cars and I was on top of them in the performance of my duty, and set the brakes on the cars that had been pushed in to hold them. I set the brakes on the car next to the banana car, and then stepped across on to the banana car. (Rec. 23 and 24). My object was to go to the brake on to the banana car and then down off the car. When I went to step over from the running board on the car to the northwest to see whether the brake on the banana car was set, on my way down off the car, when I fell. I was going to test the brake, and if necessary, set it. I stepped with my right foot from the running board first, when I made the step with my left foot I got on a casing that goes around the ice box, the casing being about two inches wide. My foot slipped or turned and this caused me to fall. (Rec. 24). Cross examination he says: "I am 45 years of age in November. In my application for employment I stated I was born in 1876, when I was really born in 1868. I made the false statement as to my age for the reason that they have a system on some roads that if a man is over 35 years of age they will not hire him. I knew this statement I made as to my age was false when I made it. Soon after I was injured I made a statement to the Railroad Company as to how I was injured. My wife wrote it at my dictation. This is the one I made. The statement contains this language:

"Give full particulars in detail as to how accident occurred." "While coupling cars on City Track at crossing near end of freight depot platform, and after riding car in and coupling up to two other cuts of cars already in there by

direction of foreman, I started to climb down from off of top of car. I put left foot on ice box casing, and when I did top was off ice box, also ice vent was misplaced, my foot slipped. I made effort to balance myself, and when I did my right foot slipped off tin facing of ice box throwing me to the ground striking my back against roof siding of refrigerator car." I made no statement in there about going to set the brake on refrigerator car. I fell from the refrigerator car. That refrigerator car was in there long before I coupled on to it. It was necessary that it be blocked or the brakes set while it was in there. (Rec. 28). I had a lantern with me. My lantern was trimmed and burning, and I had a good lantern. I stepped about two feet at a step. We naturally make the lantern shine where we step and protect ourselves as much as possible, and the light shines in front to a certain extent. (Rec. 30). We would occasionally get bananas from the man who had charge of the car. He would give them to us and we would not take them without his knowledge. I had gotten no bananas from the cars that night, but I believe the other men had gotten bananas that night. (Rec. 32). The ice hatch when I fell was open and the door laid back on the roof of the car. (Rec. 32). If I had known the ice box was open I would not have got hurt. I knew that was a banana car, and I knew that kind of car had an ice bunker in them. I knew that it was on the north side of top of the car and near the running board. I never knew one to be open before with the cover laid back on top of the car. (Rec. 35). I don't know that there was any defect in the car next to the refrigerator car that prevented me from going down off it. I presume it was just as good to go down as the other one. The brake staff was west of the ice bunker and I intended to set the brake on my way off the car. If the ice box door had been closed, I would have gone right over the top of it and to the brake staff. I insist that I was on my way to the brake. (Rec. 36). After I got on the fruit car, I made an ordinary step with my left foot and that would put me four

or five feet over on the first car on the running board of the car. That would put the brake staff nearly north of me. I then turned around and made a step with the right foot first and then with the left. I was facing east and turned to the north. I would be facing northwest when I made the second step. The brake would be located near the west end of the car. It would be on the extreme end. Ordinarily when the door of the ice hatch is open for ventilation it would be only raised up at an angle of five or six inches, and it had a kind of ratchet arrangement to hold it in position. On this occasion it was open and thrown back on the roof of the car, (Rec. 37). I went about five feet over to the ice bunker and did that in getting on to the car and turning in order to get to the brake at he extreme west end of the car. I guess I stepped about five feet in going on to the car where I was hurt. The brake was west of where I slipped and the lantern northwest." (Rec. 37, 38).

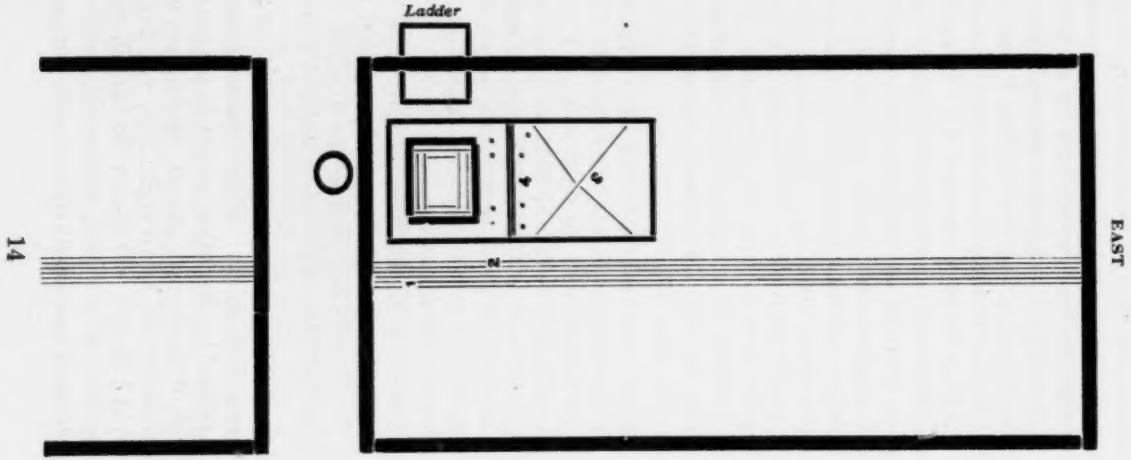
Murphy testified on cross examination in referring to plat No. 2: "I approached the car from the west. My first step was with my right foot at the point marked 1; next step with my left foot on the figure 2; next at figure 3, which proved to be on the door of the ice box thrown back. My next step was with my left foot at figure 4, which was on a casing which caused my foot to slip that caused me to fall." (Rec. 65). (See plat on following page).

A large number of railroads have adotped rules and regulations governing the transportation of perishable frieght, and the T. & P. Railroad was among the number. Among other regulations the following were introduced in evidence:

"Rule 9, Item 47: Messengers Instructions:

"Messengers in charge of Perishable Freight must be assisted to the fullest extent in protecting the interest of the owners and of the railroad and their instructions as to refrigeration, ventilation or method of transfer will govern on cars in their care, regardless of way-bills instructions, even if messengers subsequently abandons cars, but mes-

NORTH



Plat No. 2, Showing Top of a Car

SOUTH

senger's instructions must be endorsed, signed and dated by them on or securely attached to the way-bills (canceling at the same time the previous instructions thereon) and the facts (including point where instructions are given) duly recorded by the conductor or agent in whose custody the way-bills may be when so endorsed."

"Bananas are not ordinarily transported under refrigeration and should not be iced or re-iced without specific authority on billing or from owner or his representatives. (See Item 137: Transferring). When iced or re-iced it is not safe to close all ice hatches as this would be apt to chill the bananas which are more liable to damage by chilling them than other fruits and vegetables. Bananas are usually accompanied by messengers in charge whose custom it is when such cars are iced, to leave ventilators open and plugs out, at least one end, thus allowing cold air to escape."

"Hatch plugs must be in when ventilators are closed and out when ventilators are open, except when otherwise provided on billing or by messenger in charge."

"Ventilation of Bananas and Pineapples: The carriers assume no responsibility for ventilation of bananas or pineapples beyond a compliance with instructions issued by shippers or consignees. Cars should go through to destination with ventilators in same position as when received by carriers unless changes by a messenger in charge or by written order of owner or his representatives. Copy of order must be retained by the person receiving it, and the original securely fastened to billing and accompany car to destination, and full particulars of the action taken must be duly recorded in permanent form.

(a) When instructions are received to open

ventilators, all hatch covers must be fastened open and all plugs removed.

(b) When instructions are received to close ventilators, all plugs must be put in place (tight) and all hatch covers closed.

(c) Any modifications of the foregoing instructions providing for partial openings or closing of ventilators must be explicitly stated in the instructions and strictly carried out."

The defendant Railway Company requested a number of charges to the jury which implied that the man in charge of the bananas had a right to open and close the vents as he desired, and that the Railway Company would not be responsible for his act.

The Court declined to give these instructions which are set out in our assignments of error (pages 14 and 15) and the requested charges are shown to have been refused. (Pages 82 and 83 of the Record). The Court however, ignored this phase of the case, and in effect ruled in charging the jury that the Company would be responsible for the act of the man in charge of the bananas in leaving the ice vents open, but left it to the jury to find as they pleased on the question as to whether these rules and regulations for the transportation of perishable property were valid and binding.

Proposition.

The rules governing the transportation of fruits are valid and should be observed.

To hold the rules void would permit an employe to close the ice bunkers against the wish of the custodian in charge of the fruit and probably damage the fruit.

This cause is brought to this Court for the purpose of inducing this Court, if possible, to determine the validity of the rules established by the railroad effecting the transportation of perishable property. It is a known fact that the business of transporting tropical fruits and other perish-

able property from one section of the country to the other, is growing in importance with each succeeding year, and the use of these fruits has become almost a necessity in the daily life of our people, especially in the great cities, and this Court should approve, if it can be done, the making of rules and regulations that tend to preserve the fruit and perishable property that is shipped over long lines of Railroad. The rules that we have introduced have evidently been adjudged by the Railroad people to conduce to the preservation of fruit that is being shipped, and there is nothing in those rules that brings any added risks or dangers to the employes handling the fruit.

The car in question from which the plaintiff fell had been clearly and completely withdrawn from services for the time being, and the plaintiff well knew this fact. And yet, the Court has, in effect, by its charge, which is set out in our assignment of errors, left it to the jury to say whether these transportation rules were valid or invalid.

The Supreme Court of Texas, in Railway vs. Alexander (103 T. 597) has used this language:

> "Whatever the experience of jurors may enable them to know of the affairs of some kinds, it is clearly not true that they can be held to know how such a business as that here in question should be conducted, better than all the employers and employes engaged in it."

In that case the Court was considering whether the Railroad was negligent in allowing grease to accumulate on a box used to climb on to the engine. But in this case we think there is some stronger reason why the validity of these complicated rules governing the transportation of fruit should not be left to the varying opinions of the jury to determine.

The ordinary affairs of life may be well understood by a jury, and the average judgment of the twelve may be the best solution of many problems that arise in ordinary business, but the jurors should not be permitted to determ-

ine the validity of transportation rules; indeed, no person should determine them except experts in that line of business who had studied the matter from many view points.

There are not many decisions covering this phase of the case. We cite some of them:

> It is not a matter to be decided by a jury as to the curves to be placed in the track of a railroad, so decided in
>
> Tutle vs. Detroit R. R. 122 U. S. 189.

It can not be held that the rules for transporting fruit which we read in evidence were in themselves improper. To give to the custodian of a car of bananas a right to control the ventilation and temperatures of his car is not fraught with any danger to switchmen, especially after the car has been withdrawn for the time being from the transportation service. The car had been on the house track for several days and plaintiff knew it and often got bananas from it on previous nights. (Rec. 32). He had gotten no bananas that night. (Rec. 32). When he made his injury report he made no statement that he got on the car to set brake. (Rec. 32). The four steps he made on the car show he was not going to the brake. (Rec. 65). When he sought employment he made a false statement as to his age. (Rec. 26).

We submit that the Railroad Companies had a perfect right to make and enforce rules governing the transportation of perishable freight, and they had a right to carry with the freight a custodian. They had a right to give to the custodian such control over the freight as would insure its best preservation during the journey. In the case of Texas Central Railway Company against Dorsey, 30 Texas Civil Appeals. That was a suit involving damage to fresh meat shipped over the road, and the Court having considered the case reversed the judgment on the grounds, then uses the following language:

> "In view of another trial, we will indicate our views as to the respective liability, if any, of each

of the appellants. The Cudahy Company, as shippers, had the right to place in the bill of lading directions concerning the conduct of the Railway Company towards the shipment, while the same was in its possession. Gillett vs. Railway, 68 S. W. Rep. 61. The Railway Company had the right to observe and obey the statement not to ice, provided they were not guilty of negligence in delaying the transportation."

In the case of Gillet vs. the Railway, 68 S. W. 61, which was a suit for damage occurring out of the shipment of perishable freight, the Court used the following language:

"We hold that it was not the duty of the carrier to disregard the consignor's instructions, and close the vent which they directed to be left open."

And in the case of Schwartz vs. Erie Railway Company, 106 S. W. 1188, was a case of this kind. Schwartz brought suit against the Railway Company for damage to apples shipped over the Railway by reason of their freezing. The defendant set up as a defense that it placed the car at the warehouse to be loaded by the shipper; that the shipper took control of the car and loaded the same and closed it up in accordance with his own wishes, and the necessities of the freight which he put into it. That he had access to the ventilators and could leave them open or closed as he saw fit. That while the car was in possession of the Railway Company the ventilators were not changed. That in the bill of lading under which the car was received and contained instructions given for it, there were no directions that the ventilators should be closed or opened. That without such notice or directions, it was the custom, well known, and agreed to by the public, that the carrier should not change the ventilators. The lower Court held this defense good and dismissed the cause of action. The Court of Appeals affirmed the judgment, using this language:

"When the shipper loaded the car and fixed the ventilators to suit his judgment, if the custom of

the business, universal and well known, was that he was to inform the carrier if any change was to be made in the ventilators, and he failed to give such notice, the carrier had a right to assume that he did not wish the ventilators changed. If in such case the carrier had changed the ventilators, and the apples had thereby been injured, it would have been liable for the loss; for the shipper could then say: "I had fixed those ventilators right, and by giving you no directions to change them, under the custom, directed you to let them remain as they were." If the shipper had said in words to the Railroad Company that he had fixed the ventilators as they should remain for the safety of the freight, the legal effect of the transaction would not have been different from what it was under the custom shown. The carrier is not guilty of negligence in obeying the instructions given it when the goods are received, and when goods are loaded on ventilated cars, the shipper arranging the ventilators, it has a right to assume, under the custom above referred to, that he expects the ventilators to remain as he has put them, unless he gives notice to the contrary."

"In the case at bar the apples were shipped south. It does not appear that there was any change in the temperature while they were carried. It does not appear even that the carrier knew that the car was loaded with apples, and nothing is shown to make it incumbent on the carrier to depart from the well-known usage of the business. In Densmore Commission Co. vs. Duluth S. S. & A. R. Co., 101 Wis. 563, 77 N. W. 904, the apples rotted because they were not ventilated. A recovery was denied. The Court said: "If the plaintiff desired to have the apple department of the cars venlated by opening the side doors at stations from

time to time during transit, then it should have had such stipulation insterted in the shipping order."

The above authorities certainly established the proposition as applied to the case at bar, that if the Railway Company had closed the ventilators in the car from which Murphy fell, and damage had resulted to the bananas in the car, the Railway Company would have been held responsible for the damage, which holding would presuppose that the Railroad Company had no right to close the ventilators against the will of the man in charge of the fruit. And if the Railway Company had no right to change the ventilators from the position in which the owner of the fruit desired them to be, that presupposes a duty on the part of the Railway Company to leave the ventilators like the man in charge of the fruit had placed them, and if that is true, there is no basis in the evidence for holding that the Railway Company was negligent by reason of the fact that the ventilators were open at the time Murphy fell from the car.

Plaintiff makes the contention, perhaps, that the ventilators need not have been entirely closed, but should have been partially open and held up by the ratchet provided for that purpose, as it appears that the door of the ventilator could have been raised four, six or eight inches, and held in that position by the ratchet. The evidence shows, to my mind, that that would have been a more dangerous position for the door to have been than thrown entirely back on the roof of the car as it was. It will be observed that the hinges of the door were on the east side. Then if it had been raised and fixed on a slant as Murphy approached it from the west, it being night, he would be looking exactly at the edge of the door and could not have observed whether it was open or closed, and further it does not appear that Murphy stepped into the opening itself that caused him to fall, but that he stepped on the casing of the opening, which being made of tin or some polished metal, caused his foot to slip and turn which caused him to fall. So, it seems to me that the door would have been more dangerous in that position than in the

one in which it was placed. There is another matter that merits attention, and that is this: On page 64 of the record will be seen a map showing the construction of the car on top. Murphy come from the west walking east and stepped on to the banana car, which is shown in the picture. He made one, two, three, four steps, as shown by the figures 1, 2, 3, 4, which he admits having made, in his evidence on page 65 of the record. He made a statement soon after his injury, in which he stated that he got on to the banana car for the purpose of climbing down, and didn't state that he got on there for the purpose of examining or setting the brake on the banana car. He admits having made a false statement as to his age when he applied for work, and that he knew it was false when he made it. (Rec. 26). He testified on the stand that he got on the banana car to see if the brake on that car was set, and to set it if it was not set. He says that he would step probably two feet each time. Now if we examine the plat and the steps 1, 2, 3. 4, we will observe that it absolutely contradicts his statement that he got on the banana car to set the brake. The cars were standing still at the time. His third step would put him about eight feet from the brake which he claimed that he was to examine. His fourth step is the one where his foot slipped and turned and caused him to fall. The two other brakemen had come across from the yard to the banana car and Murphy had ridden on top of the other cars in to the banana car on the spur track. It appears that these switchmen frequently went to the banana car and obtained bananas to eat during the night. It appears probably that Murphy had not had any bananas that night, then reading between the lines, it becomes perfectly apparent that Murphy got on the banana car and with two other switchmen who come across to the banana car for the purpose of getting bananas and that he did not get on the banana car for the purpose of setting the brake on the west end of the car. So in view of the foregoing authorities and admitted facts, the judgment is shown to be improper in this case because the

fact that the ice vents on the car were open was not the result of any negligence on the part of the Railway Company.

If the cases we have cited are worthy of consideration then the Railway Company had no right to endanger the proper preservation of the fruit by partially closing the ventilators, therefore we had no right to place the lid on a slant and stay it with the ratchet. What answer could we have made to the owner of the fruit if we had partially closed the ventilators and harm had come to the fruit thereby?

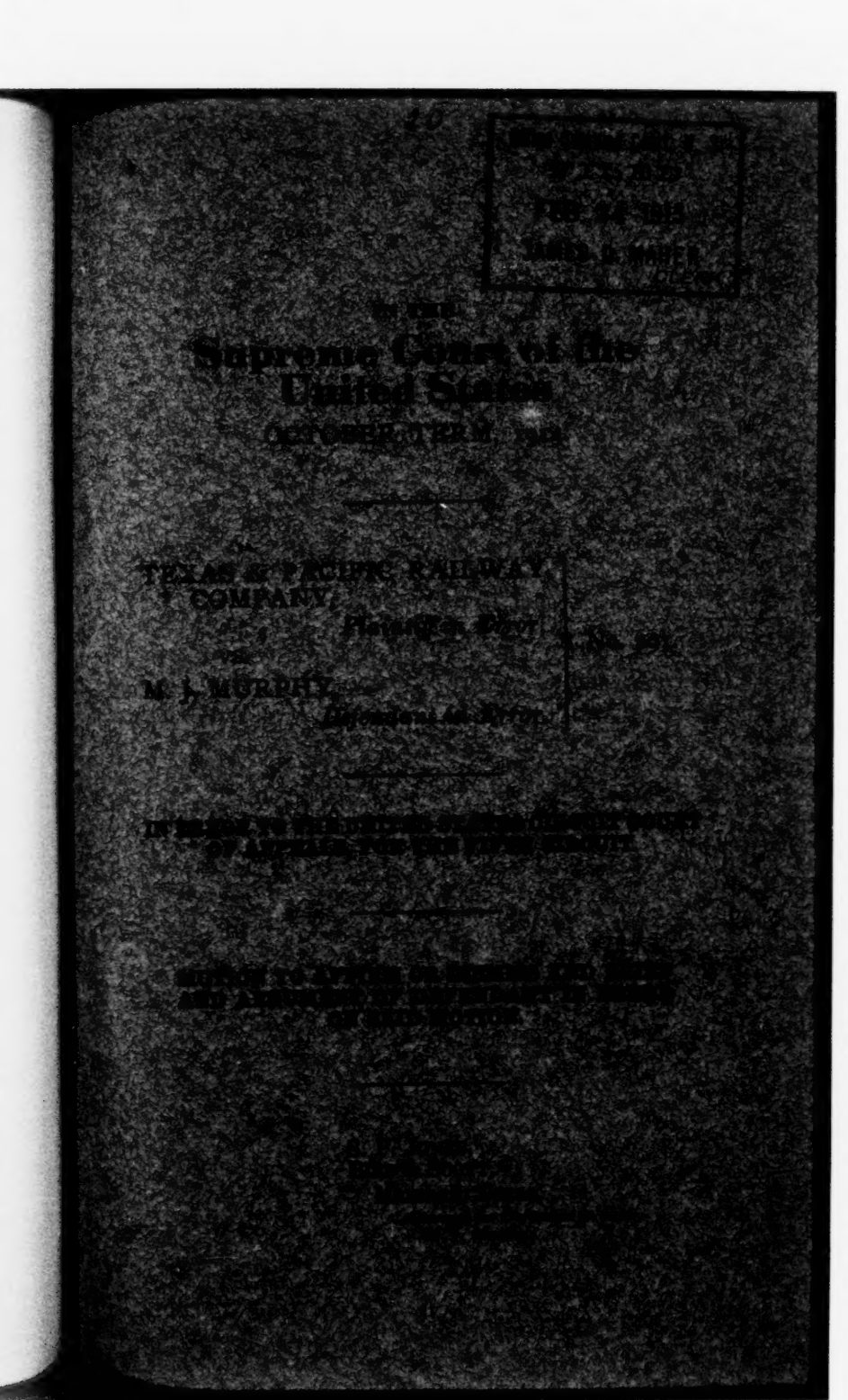
The Court would not charge that the refrigerator rules were void and he would not charge that they were valid, but told the jury that the rules may be considered in deciding the case. We think the Court thus abandoned to the jury one of its most important prerogatives, and as we can not tell what the jury decided about the validity of the rules, and thus their validity has been left to the decision of this irresponsible arm of the judiciary, whose privilege of sanctuary is often harmful to the important interests of the public.

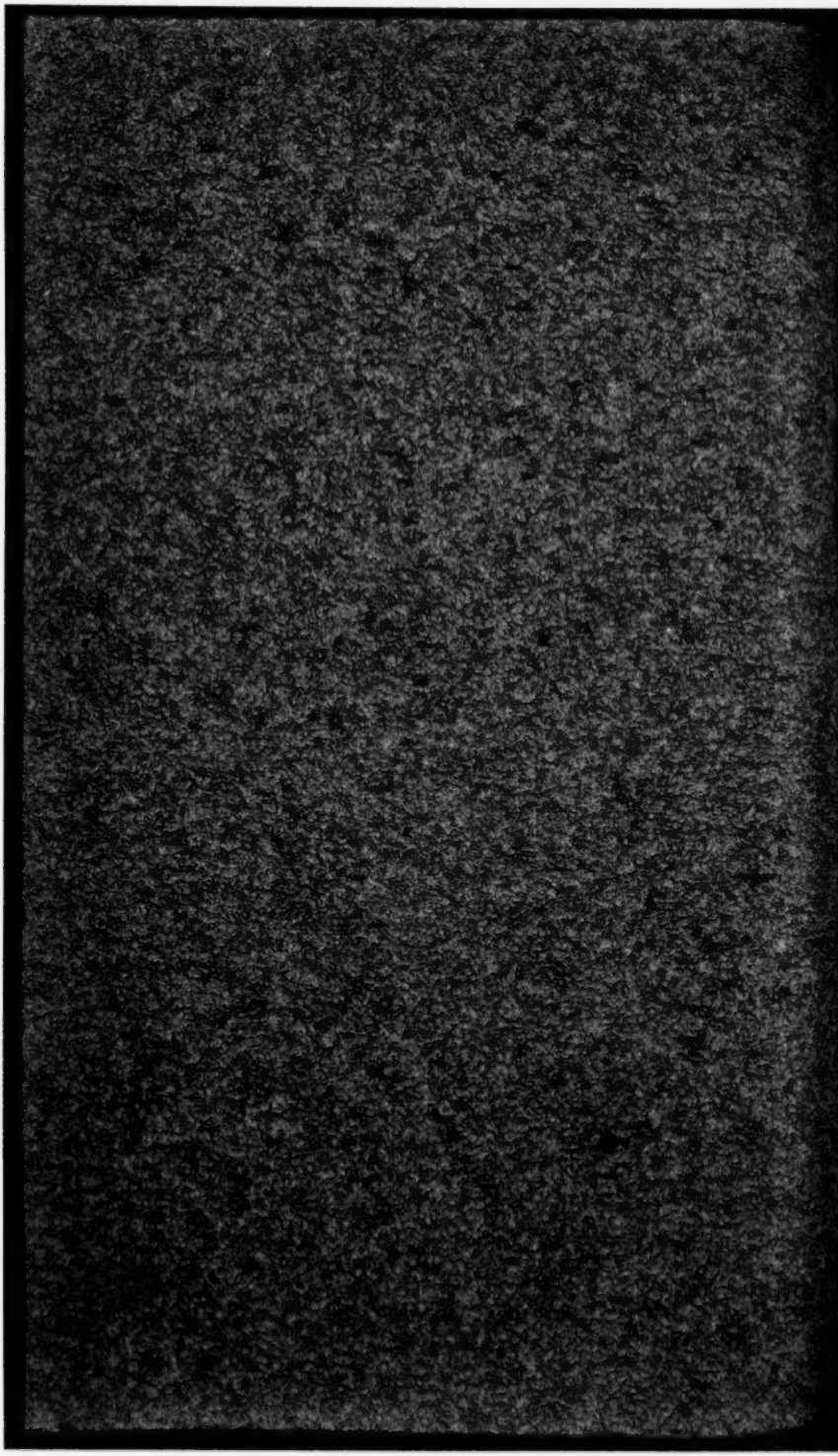
The jury must have found the rules to be void, or refused to give them any weight. The Court told the jury to consider the rules but he did not tell the jury what effect their being void or valid would have on the case.

We pray the cause be set down for argument and that the judgment be reversed.

F. H. PRENDERGAST,

Attorney for Plaintiff in Error, Texas & Pacific Railway Co.





THE TEXAS & PACIFIC RAILWAY COMPANY
PLAINTIFF IN ERROR.

vs.

M. J. MURPHY
DEFENDANT IN ERROR.

INDEX TO BRIEF ON MOTION TO AFFIRM OR DISMISS OF THE DEFENDANT IN ERROR.

FIRST. Page

SECOND.

THIRD.

FOURTH.

FIFTH.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
M. J. MURPHY,
Defendant in Error.
No. 791.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

MOTION TO AFFIRM OR DISMISS AND BRIEF AND ARGUMENT OF DEFENDANT IN ERROR ON SAID MOTION.

MOTION TO AFFIRM OR DISMISS FILED BY THE DEFENDANT IN ERROR.

Now comes M. J. Murphy, by his attorneys appearing in that behalf, and moves the Court to affirm or dismiss the above entitled cause under subdivisions 5 and 6, of Rule Six of the Supreme Court of the United States, because it is manifest that the writ of error in this cause was sued out for delay only, and that the questions on which the decision of said cause depend, are so frivolous as to not need further argument.

STATEMENT OF NATURE AND RESULT OF CASE.

M. J. Murphy recovered a judgment in the District Court of the United States for the Eastern District of Texas, at Jefferson, Texas, against the Texas & Pacific Railway Company for Twelve Thousand Dollars actual damages for personal injuries that he received by falling from the top of a refrigerator car while engaged in service of the said railway company as a switchman in its yards at Marshall, Texas.

The case was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, in an opinion reading as follows:

"By the Court:

> We find none of the assignments of error well taken. Judgment affirmed."

On or about the 1st day of September, 1912, the defendant in error received the personal injuries for which he recovered damages in substantially the following manner to-wit:

There was a refrigerator car partially loaded with bananas, located on one of the unloading tracks of the Texas & Pacific Railway Company's yard at Marshall, Texas, and which car was being used by the switching crew, of which Murphy was a member, and it became Murphy's duty to go on top of this particular car and in descending from the car, or preparatory to descend from the car, at about four o'clock in the morning, he stepped

on the sharp flange of the ice box opening (which was unprotected), which turned his foot and caused him to fall to the ground and receive the permanent injuries for which he recovered judgment.

This particular car was on a track where the switching crew was required to do service in handling cars, and setting brakes thereon, etc., from time to time throughout the night.

The defendant in error proved by a great number of witnesses that the cover, or door, of the ice box, should not have been thrown back on the roof of the car, but should have been set at an angle in opening the door for ventilation by means of a ratchet device provided therefor. That it was extremely dangerous to leave the door thrown wide open, as in this case.

Plaintiff in error contended that in view of the fact that the owner of the bananas was occupying the car at the time, that he had the right to place the doors of the ice box open in such position as he saw fit.

The Court instructed the jury at length upon the liability of the railway company and the duties of the defendant in error, and permitted a recovery in favor of the defendant in error only in the event that it should be found that the railway company was negligent in permitting the doors to be left open with the covering thrown back upon the roof of the car; and while not relieving the railway company from liability for any acts or conduct upon the

part of the man who owned the bananas in the car, permitted the jury to take into consideration the fact that the owner of the bananas was in charge of the car, in determining whether the railway company was guilty of negligence and also whether the defendant in error was guilty of contributory negligence in stumbling and falling from the car.

In the United States Circuit Court of Appeals, the plaintiff in error contended that inasmuch as the owner of the bananas was in charge of the car, that the railway company was not liable to its switchmen for injuries received by them by reason of the doors or openings to the ice bunkers or ventilators being left in a dangerous position or condition, by the person in charge of the car. The defendant in error contended in the Trial Court, and in the United States Circuit Court of Appeals, that inasmuch as the car was being used in the regular service and that the defendant in error together with other members of the switch crew, had to use the same in the discharge of their duties in making up and breaking up trains in the yards that the duty of the railway company to furnish the defendant in error a reasonably safe place to work, was a non-delegable duty and that if the doors or openings were left in a dangerous position, one in which the defendant in error had no reason to expect same to be left, and if the

jury should find that this constituted negligence, then the defendant in error would be entitled to recover damages for injuries sustained by reason thereof.

This cause was removed from the State Court to the District Court of the United States, and has been brought to this court by Writ of Error solely because the plaintiff in error is incorporated under an Act of Congress. There is no plain error of record. (See T. & P. Ry. Co. vs. Howell, 224 U. S. 557).

The defendant in error, by his attorneys aforesaid, presents with this motion to affirm or dismiss, a printed brief and argument in support thereof, which is hereto annexed.

WHEREFORE, the defendant in error prays that the said cause be affirmed or dismissed. Or, that if the motion to affirm or dismiss is not granted, the cause be transferred for hearing to the summary docket and diposed of.

S. P. JONES,
BIBB & SCOTT,
Marshall, Texas.
Attorneys for Defendant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
M. J. MURPHY,
Defendant in Error.

No. 791.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

BRIEF AND ARGUMENT OF THE DEFENDANT IN ERROR ON MOTION TO AFFIRM OR DISMISS.

STATEMENT OF THE NATURE AND RESULT OF THE CAUSE OF ACTION IN THE TRIAL AND CIRCUIT COURT OF APPEALS.

Inasmuch as the Transcript for this case in the Supreme Court of the United States has not been printed, all references to pages in the Transcript in this brief, will be to the pages of the Transcript in the United States Circuit

Court of Appeals, but all quotations and statements from the Transcript are carefully and literally copied.

M. J. Murphy was a switchman employed by the plaintiff in error in its railroad yards at Marshall, Texas, working at night. The switching crew was composed of some four or five persons and on the night Murphy was injured, September 2nd, 1912, at about four o'clock in the morning, this crew was engaged in placing some cars upon what is known as the city track, in the city of Marshall, the cars on which had to be handled frequently at night by this switching crew. At the particular time they were placing cars on this track and in placing the same in position it became necessary to couple onto and move several other cars that were already on the track.

Murphy's duties required him to ride on top of the cars being switched in, and to release brakes, etc., and when the cars should finally be placed in position, to set the brake on the end of the string of cars so as to hold all the cars in the proper place. A refrigerator car was already on the city track at a point near a street crossing, and the car that was moved in on the city track by Murphy's crew had to be placed down near this refrigerator car. Several cars, constituting a string of cars, were in this way coupled together and were in turn coupled to the refrigerator car, it being the intention to leave all of these cars coupled together. When all of the cars were thus coupled together, Murphy, who was on the top of the

string of cars, and near the end of the string of cars, set some brakes on the cars and having set the brakes on the car next to the refrigerator car, stepped over on the refrigerator car to set the brake on it in order to properly hold it in position and with the intention of then descending from the top of that car. The brake of this refrigerator car was on the northwest corner or end of the same and the ladder for descending was at the same end of the car and on the north side, only a few feet from the brake. After stepping on the refrigerator car Murphy started to the brake and stepped upon the sharp flange of an unguarded opening or hole in the roof of the car, which caused him to fall from the top of the car to the ground and tracks below, a distance of some twelve feet, striking on his feet or back in a slanting or careened position. The hole or opening, which caused Murphy to fall, is what is known as an "ice hole," being an opening about two and one-half feet square, located near the end of the car, and between the running board and the ladder.

This "ice hole" had a casing or flange around the top, protruding about two and one-half inches above the car roof, which flange was about one inch thick and the door or cover, fits down over or on this casing or flange. The door or cover is hinged on one side and is equipped on the other side with a ratchet and lever that permits it to be raised a few inches on one side and held in position by means of the ratchet device so as to properly ventilate the car, or shut off ventilation by closing it, as may become

necessary. Inside of this casing, and under this cover, and fitted into the opening, is what is termed the "ice plug" which fits in or "plugs" up the opening or hole leading to the ice compartments, when in place. When ventilating the cars the "ice plugs" are removed or loosened, and the door or covering of the "ice hole" is raised a few inches and made stationary by the said ratchet device. This permits a proper ventilation of the car, but at the same time leaves the covering or protection over the hole or opening so one cannot step or fall into it.

This refrigerator car was loaded with bananas at the time and one Marshall, had charge of the bananas and the railway company claimed he had charge of the car and instead of the covering being on or over the "ice hole," or being fixed in place for ventilating the car by means of the ratchet device, which would have made it impossible for Murphy to step through or fall into the hole, it was thrown entirely back on the roof of the car and the "ice plugs" were out, leaving an unguarded hole or opening, approximately two and one-half feet square practically in the path that Murphy had to travel in going to the brake to set the same to hold the car in position.

The railway company claimed that the condition of the car had been brought about by this man, Marshall, which it claimed it had given control of the car and thereby claimed to be relieved of any duty to the switchman in regard to the condition of the car. The evidence showed

that all cars on this particular track were liable to have to be pushed or moved by this switching crew during the night's work. The uncontroverted evidence showed that it is both dangerous and unusual for the openings in the refrigerator cars to be left unguarded and uncovered and that they are provided with ratchet devices for the purpose of preventing them from being left wholly open or uncovered. That this ratchet device permits a door to be raised sufficiently to ventilate the car and at the same time to protect employes by furnishing a covering so as to prevent employees from stepping into said opening, or being thrown from the car. The railway company attacked the judgment in the Circuit Court of Appeals and sought to escape liability on the one proposition, viz: The car was in charge of and under the control of Marshall, who had the bananas for sale, and that under the rules governing the transportation of bananas, Marshall had a right to have the opening open or closed at his pleasure. No other question was presented in the brief of the plaintiff in error in the Circuit Court of Appeals, and we will confine ourselves to answering this proposition, under the following counter-propositon thereto:

The duty of the master to provide for his servant a reasonably safe place in which to work, is an ever present, non-delegable duty which cannot be escaped by delegating the control of the place to another party and when attempted, the person thus placed in charge of the mas-

ter's property, becomes the agent or representative of the master for whose negligence or mis-conduct the master is liable or responsible to his servants.

AUTHORITIES.

Hough vs. Railway Co., 100 U. S. 213.
Railway Company vs. Baugh, 149 U. S. 386.
Railway Company vs. La Rue, 27 U. S. C. C. A. 363.
Toledo Brewing Co. vs. Bosch, 41 U. S. C. C. A. 482.
Railway Company vs. Milam, 58 S. W. R. 735.
Railway Company vs. Winton, 66 S. W. R. 477.
Railway Company vs. Conway, 98 S. W. R. 1070.
Texas Traction Co. vs. Morrow, 145 S. W. R. 1069.
Cooper vs. Robischung Bros., 155 S. W. R. 1050.

STATEMENT FROM THE EVIDENCE.

The defendant in error was not injured by reason of the doors being placed in a position to ventilate the car. In fact, if the door had been placed in a position to ventilate the car by means of the ratchet device, the defendant in error would not have been injured. We here give a concise statement of the facts which we think entirely refute the position taken by the railway company:

FIRST.

The rules referred to in the brief of the railway company in the Circuit Court of Appeals, are not rules governing the switchmen's work. They are rules for the railway agents at stations, the conductors in charge of trains, and the messengers, or men, in charge of the cars of fruit.

CHARLES WINEGAR testified: "Switchmen have nothing whatever to do with the opening and closing or

closing of ventilators in cars at Marshall, Texas. The conductor sees that the ventilators are regulated on the road and a man is assigned to attend to them when the cars are in the yard." (Record 49).

HARRY HILL testified: "As far as I know, the man in charge of the car attends to the ventilators, and has charge of the opening and closing of them." (See Record 44).

ROBERT HOWARD testified: "Railroad men have nothing to do with the handling the ventilators, but that is left to the messenger in charge of the car, if there is one in charge." (See Record 41).

W. M. MARSHALL testified: "I have charge of the car, and open or close the ice bunkers, or have the man that is with me do it." (See Record 62).

SECOND.

Even if these rules authorized the railway company to put a third party in control of the car, to handle it according to the rules and for being so handled, the railway company would not be liable, still they would not be applicable here, for the very good reason that the car was not handled according to these rules. The rules providing for opening the hatch or ventilators, and authorizing them to be opened, does not authorize them to be thrown wide open, back on the car roof with the plugs out and a pitfall left in the path of trainmen, but clearly contemplates that they are to be opened by simply raising them a few inches or more, according to the necessity of the circumstances,

and fixing them in such position by the ratchet arrangement with which they are equipped.

THE PLAINTIFF MURPHY testified: "If I had known the ice box was open I would not have got hurt. I knew that was a banana car, and I knew that kind of cars had ice bunkers in them. I knew it was on the north side of the top of the car and near the running board. I never knew one to be open before. They should not be open, with the cover laid back on top of the car. I had my mind on my work. If I had known the hole was open I would have seen it. We were not expecting to find them open." (See Record 35).

Again he testifies: "Ordinarily, when the door of the ice hatch is open for ventilation, it would be open five or six inches, or six or eight inches. And it had a kind of ratchet arrangement to hold it in position. There is a contrivance with notches in it to hold the door in position. On this occasion, the door was not open at a slant, but was thrown entirely back on top of the car." (See Record 37).

Again he testifies: "For the purpose of ventilating, they set the ice box doors at various angles, from nearly closed, to half way straight up. They do that for ordinary purposes of ventilation. And I have seen cars come into the yard that way. They expect to find them in that position when they come into the yard." (Record 38).

ROBERT HOWARD testified: "It was unusual to find those doors that way. Those doors open into the ice chambers of the car. They have an arrangement made with an iron rod that holds in a ratchet, and with that, they regulate the distance they elevate the door." (See Record 39).

Again he testified: "They have the ratchet so you can raise them to different heights, and that is done by a

pin or ratchet, with notches in it. They usually have them fixed somewhere between down or half way straight up, or forty-five degrees of slant." (See Record 40).

HARRY HILL testified: "Some of the ventilators have a ratchet and the door can be propped up, and he can raise them to different heights to ventilate his fruit." (See Record 44).

CHARLES WINEGAR testified: "It is not customary in the Marshall yards of the defendant, or anywhere else that I know of, to allow the ventilators or ice holes in refrigerator cars to remain open, with the doors thrown back and the plugs out." (See Record 49).

Again, he testifies: "The ventilators are adjusted according to the weather, but are not supposed to be wide open at any time." (See Record 49).

Again, he testifies: "I have never noticed in my experience, a hatch in the top of the cars being wide open and the plug out, as in this case." (See Record 51).

Again, he testifies: "If the ice vent in the top of the car is partly open, set with ratchet, a man could see it. If it is thrown back, it looks like a regular car roof." (See Record 52).

THIRD.

The rules do not contemplate that the doors or covers shall be thrown back on the car roofs, and it is both unusual and dangerous to leave the doors open as these were.

(A) The doors on this car were thrown back on the roof of the car, and the ice plugs were out.

MURPHY testified: "The ice hatch, where I fell was open, and the door laid back on the roof of the car." (Record 32).

ROBERT HOWARD testified: "The ice box door was open and thrown back on the roof of the car towards the east, towards the center of the car." (Record 39).

CHARLES WINEGAR testified: "In the west end of the car, from which plaintiff fell, the ventilators were open, the tops of doors being thrown back towards the east end of the car and the plugs or covers of the holes were pushed down into the ice box, something like you would push a bucket top down into a bucket by putting it in edgewise."

(B) This was an unusual condition in which to find ice holes.

MARSHALL testifies: "The doors are arranged with a kind of ratchet and lever to regulate the height to which they are raised, so that they can be opened, and at the same time, keep the hole protected so a man can not fall in there. Lots of times we fasten them up, when running on the road. When it is partly raised, it affords a protection against anybody falling in the hole." (Record 63).

CHARLES WINEGAR testified: "I have never known of any case where the ventilator doors were allowed to be left wide open and unprotected." (Record 51).

Again, he testified: "I have never noticed in my experience a hatch on top of the car being wide open and the plug out, as in this case." (Record 51).

He also testified: "It is not customary in the Marshall yards of the defendant, or anywhere else that I know of, to allow the ventilators or ice holes in refrigerator cars to remain open and the doors thrown back with the plugs out." (Record 49).

ROBERT HOWARD testified: "It was unusual to find those doors that way." (Record 39).

MURPHY testified: "I never knew one to be open before. They should not be open with the cover laid back on top of the car." (Record 35).

(C) Switchmen had to move fast in doing their work. It was the plaintiff's duty to be where he was. It was necessary for him to set the brakes. And he was a careful switchman.

MURPHY testified: "In going up and down cars and setting brakes, and doing the work required of him, a switchman has to move rapidly. It was hard work I was doing there and required quick movement all the time." (Record 22).

Again, he testifies: "I did not see it until it was too late. I was in a hurry. You don't have time to take all the caution; in switching you have to work fast. We worked there all night, and sometimes we were compelled to run to catch the engine. At the time I reached the cut of cars next to the refrigerator car I was in a hurry." (Record 31).

Again, he testifies: "We were always in more or less of a hurry. We wanted to get our work done. We are obliged to be in a hurry. If a train is called for such a time, we are obliged, lots of times to be in a hurry." (Record 32).

Again, he testifies: "We had to have brakes set on cars next to the crossing, and when you go three or four car lengths it is level, but for three car lengths west of the

crossing cars will roll out on the main line if the brakes are not set or a chunk put under the wheels." (Record 24).

Again: "I went to step over to the brake, which would be a northwest course, to see whether it was set or not on my way down off the car, which was the customary thing to do. If I got to the brake and found that it was not set, I intended to set it. I was going to test the brake, and if necessary, set it." (See Record 24).

ROBERT HOWARD testified: "We went in on that track in the regular routine of work, and there was no certainty as to the number of times we would have to go in there. Trains were coming into Marshall and going out all night long. Marshall was a place of twelve or thirteen thousand people. And there are seventeen tracks in the yard that go off the main lead." (Record 39).

Again, he testified: "The city track at that place was down hill from the east towards the west, being uphill towards the east, and the cars in there would have to have the brakes set or chunks under the wheels to keep them from rolling out." (Record 39).

Again, he says: "He went on top of the cars to let the brakes off, and then tie them down, that is, set the brakes to hold them in the track. When the cars got to the proper place, he was supposed to set the brakes necessary to hold them there." (Record 40).

Again, he testified: "When the banana car was placed on the city track, the brake would have to be set to hold it there, or it would have to be chocked. If the brake is set on one car and the other cars are switched against it, that is apt to knock the brake off the stationary car." (Record 41).

He further testified: "He was a good switchman, and a careful man of the company's property and his own safety. He was as good switchman as I ever worked with." (Record 41).

CHARLES WINEGAR testified: "A man engaged as Murphy was, did not have the time to inspect the car on which he was working to ascertain the conditions." (Record 52).

Again, he testified: "The crew had run the engine in on the city track to spot some cars, and the plaintiff was on top of the cars for the purpose of setting the brakes on the cars so they would stand. His duties required him to go on top of the cars switched that night."

HARRY HILL testified: "Had known the plaintiff eighteen or nineteen years; he was a good switchman and a careful man. He was not a drinking man that I know of." (Record 44).

HOWARD testified: "Murphy was a sober man. I never saw him take a drink while I knew him." (Record 43).

(D) The railway company's witness, Russell, testified: "I guess it would be pretty dangerous to have a hole of that size in the top of the car, where the switchman would have to go to set a brake." (Record 61).

McNEES, the defendant's witness, also testified: "Of course I could not imagine a more dangerous place than a hole in the top of a car." (Record 60).

CHARLES WINEGAR testified: "It is not usual to leave ventilators open. To do so would be dangerous to switchmen." (Record 49).

We feel that an examination of the record referred to, and from which the above quotations of the testimony

are copied, will convince the Court that the evidence unquestionably establishes the three main facts stated in the foregoing paragraphs. Also that switchmen engaged as Murphy was engaged, had to move rapidly and did not have the time or opportunity to examine or look for dangers or defects of this kind. That it was Murphy's duty to be in the place at the time, as well as his duty to set the brake on the refrigerator car, or examine and see if it was already set, before descending to the ground, and that he was a careful workman and received his injury by reason of the existence of an extremely dangerous condition, in fact, specially dangerous when the rapidity with which he must move, the position in which he worked, and the time during which he worked, are taken into consideration.

The contention of the railway company does not raise the question of one where the master claims that the servant was injured on premises or by appliances neither owner nor controlled by the master, but it is clear that the car was controlled and in fact, in charge of, and for the purpose of this case, owned by the master, and the master contends that it did not have control of the car but had given the control, under the rules introduced in evidence to the banana man, Marshall, to whom it had delegated the care and responsibility of keeping the car in a condition to be used by its servants.

Even if the ownership and control of the car had been placed in Marshall, it would not constitute a defense.

Discussing those cases holding the master liable, even though ownership and control of the place be in the control of a third party, Mr. Labatt, in his valuable work on master and servant, Volume 3, Section 1073, says:

> "The broad ground relied upon, is simply that, as between a servant and his employer, all appliances which he is authorized or directed to use ought, in fairness, be placed upon the same footing as those which actually belong to the employer. In other words, the owner of the appliances and his servants are, for the purpose of determining the injured person's right of action, treated as being constructively the agents of that person's employer for the performance of a non-delegable duty incumbent on the latter. The mere fact that the employer, having no control over the appliance, is unable to remedy defective conditions is, in this point of view, manifestly insufficient to absolve him, since he always has it in his power to safeguard his servants by refraining from giving them orders whch will put them in a position where their safety will be imperiled by those conditions."

Again, discussing the decisions, pro and con, on this point, he says:

> "The present writer ventured to express the opinion that the decisions which declare the master to be liable in cases of this type are more consistent than the others with those general conceptions of public policy which are the ultimate foundation of his obligations to his servants. In many, perhaps most instances, there is no real ground for contending that his want of control

> over an instrumentality constitutes a serious obstacle to his obtaining sufficient knowledge of its condition to enable him to see whether it will unduly endanger his servants or not, and there would therefore, be no hardship or injustice in requiring him to make such investigations as may be necessary for that purpose. Even where an adequate examination by his own employes is practically impossible—as, where the injury was caused by defects in the track of a railway not belonging to him—it seems not an unreasonable application of the doctrine of non-delegable duties to treat the servants of the owner as his agents. If he desires to protect himself from the consequences of the negilgence of persons not in his service, or under his supervision, it is easy for him to do so by making specific arrangements with their master for indemnification in the event of his being obliged to pay damages. To relegate the servant to his action against the party who owns the instrumentality must, in many cases, be productive of serious inconvenience, and will occasionally deprive him of all remedy."

And upon this question, in the case of Grand Trunk Railroad Company vs. Tennant, 14 U. S. C. C. A. 190, Judge Putnam, in the course of the opinion, uses this language:

> "A railroad corporation ought not to be allowed ordinarily, to send its trainmen upon private sidings or tracks, nor daily work, without making proper efforts in some way to provide for their safety. The dangerous nature of their employment, and the necessity of their prompt, and sometimes unquestioning, obedience to orders do

> not ordinarily justify the Court in relaxing the care which railroad managers must extend to them, wherever they may send them for their usual work."

As heretofore stated in this brief, in this case the question of ownership is not involved. The railway company seeks to escape liability simply because it adopts or promulgates certain rules, permitting a third party to take control. It is difficult to see wherein lies the distinction between this theory and those cases like Railway Company vs. Peterson 162, U. S. 346, and Baird vs. Reilly, 35 U. S. C. C. A. 78, where the master attempts to separate his business into departments, and places some one in charge of each department, or where he attempts to delegate to some one of his servants the duty of keeping the place or appliances in reasonably safe condition for his servants, and thereby attempts to escape lability, on the ground that he had given control of the place or appliance to such party, and that such party, being a fellow servant of the injured party, there could be no recovery. There is no question, but that at one time this was apparently a favorite defense, but even in those cases it was held, as said in Railway vs. Baugh:

> "A master employing a servant impliedly engages with him the place in which he is to work, and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe * * * * He has a right to look to the master for the discharge of that duty, and if the master instead of discharging it him-

> self, sees fit to have it attended to by others, that does not change the measure of the obligation to the employes, or the latter's right to insist that reasonable precaution shall be taken to insure safety in these respects."

It is said in Railway vs. Peterson, in speaking of these positive duties, which the master owes to the servant:

> "He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances and machinery for the accomplishment of the work necessary to be done. * * * * If the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employees; and, if the employee suffer damage on account thereof, the master is liable. If, instead of personally performing these duties, the master engages another to do them for him, he is liable for the neglect of that other, which in such case is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such."

It will be noted in those cases, and many other cases, that where the master placed a servant in control of his premises and attempted to delegate to him the duty of keeping the place and appliances safe for the master's servants, that the Courts not only held that the master was liable for the failure of such person to perform these obligations, but went further and held that in no event could

such a person be a fellow servant of the employee. The fellow servant question is of course not involved in this case, but it does seem that if the master cannot escape the positive duty which he owes the servant, by attempting to delegate it to another servant by giving such other servant control of the place of work, and the appliances with which to work, without being liable for the failure of such servant, that then he certainly can not delegate this duty to a stranger and thereby absolve himself from liability.

In Railway Company vs. Herbert, 116 U. S. 647, Judge Field in speaking of the duty of the master, with reference to a servant, uses this language:

> "It is equally well settled, however, that it is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means by which it is to be performed, and to keep them in repair and order. This duty he can not delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its commission. Indeed, no duty required of him for the safety and protection of his servants can be transferred so as to exhonorate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skillful colaborers, or from defective machinery, or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him."

The rule that it is the master's duty to furnish the servant a reasonably safe place in which to work, and reasonable safe appliances with which to do the work, and to exercise ordinary care to keep them so, and that this is the positive personal duty of the master that can not be delegated to another without the master being liable for the acts of such other, is too well settled to require the citation of other authorities. It is settled by a long line of decisions of the United States Supreme Court, since the case of Hough vs. Railway Company, 100 U. S. 213, down to the present day, and the trend of more recent decisions of that Court makes it apparent that the tendency is to strengthen, rather than to modify the rule, and if the duty cannot be delegated in the sense that the master cannot employ another to perform it, and thereby escape liability for its non-performance by the third party, and cannot separate his business into departments, placing a head or vice-principal over each department, without being liable for his negligence in that respect, then it is obvious that the master cannot escape or relieve himself of this positive duty by agreeing to or promulgating rules putting his premises or appliances which he requires his servants to use in control of third parties, and permit them to make the places or appliances unsafe and create pitfalls for his servants, and thereby escape liability for resulting injuries to the servant.

We submit that such would constitute a subterfuge permitting the principle of Law referred to, to be evaded

to such an extent as to practically annul it. Such proposition carried to its logical conclusion would permit the railway company to place each car under the control of the consignee, immediately upon its arrival in the railway yards, and give the consignee absolute control thereof, the railway company agreeing, of course, to switch it to the proper place, and reserving the right to move it around the yard in its switching operations, having its employees use it and move it about as was done in this case, and yet, if it became unsafe or dangerous, the railway company could reply to its servant's action for injuries by reason of its unsafe condition, that it had no control over it, and therefore, was not liable to him.

As said by the Texas Court in the case of Cooper vs. Robischung Bros. 155 S. W. R., page 1052, speaking of evidence that the master did not have control of the place which was objected to, says:

> "If, in doing the work in which the plaintiff was then engaged, the defendant owed to him the duty of exercising ordinary care to furnish him a reasonably safe place to work, we think he can not be heard to say, in justification of the failure to discharge this duty, that he did not control the place where he had put the servant to do the work assigned to him, or that he had no right to alter the conditions existing there. We think the objection should have been sustaned; but, in view of the Court's charge which imposed on de-

fendants the duty above referred to, we hardly think the error in admitting the testimony was so harmful as to require a reversal."

However, as has been before suggested, the railway company's defense cannot be based entirely upon its right to adopt proper rules and thereby delegate its duty to a third party and relieve itself from liability, if the rules are reasonable, and have been complied with, even if the affirmative of this were to be announced, for in this case, as a mater of fact, the very rules upon which the railway company relies, were violated, for it is clear from the testimony, that by the terms "opening the hatch" and "ventilating the cars" that the door or cover of the ice hole was to be raised a few inches, and fixed in position by use of the ratchet and lever equipment. (See testimony quoted under statement number two, of facts proven, above). And in this case, they were thrown entirely back on the car, leaving an unguarded opening or hole, which was dangerous to the plaintiff as shown by the testimony. (See testimony under statement of facts proven, number three, above).

Therefore, even if it were conceded that the plaintiff in error's contention was correct, and that it might enact these rules and not be liable for injury to the plaintff Murphy, if the rules were complied with by the man in charge of the car, still it could not be seriously contended that though they were violated, and the party in charge was negligent, and by his negligence created a pitfall,

causing the plaintiff's injury, that the plaintiff in error would not be liable for such negligence, certainly no one will have the temerity to advance the proposition that the master can, by adopting rules, delegate his duty of furnishing the servant a reasonably safe place and reasonably safe applinces to a third party by putting them in the control of a third party to be handled by him under certain established rules in a particular manner and require his servants to use the property which is in charge of such third party, and escape liability for injuries to the servant even though the rules themselves are violated by such third party, and in addition to violating the rules such third party fails to perform the master's duty towards the servant, and negligently sets a death trap for the servant, while purporting to act under such rules of the master. And here the master not only attempts to escape by rules which he claims reasonable, and which he claims relieve him of liability because they are reasonable, but goes further and contends that even though these rules themslves are also violated, and the party acting under them is guilty of gross negligence, he is still relieved from liability to his servant.

Plaintiff in error, on page 17 of its brief, lays down the broad proposition, that the Court should have instructed the jury in substance that the man in charge of the bananas had a right to open and close the vents as he desired, and that the railway company would not be responsible for his act. We repeat, that it is clear that the

rules, did not contemplate, and it was not customary or usual for these doors to be wide open as in this case, and furthermore, that it was a dangerous condition. And the jury found that to leave them so was negligence, for the Court charged the jury, bottom of page 72:

> "Though you might believe from the evidence that the plaintiff had proven a failure of the defendant company to discharge its duty in the particulars set out in the petition, and that such failure occasioned the injury, yet, in order to entitle the plaintiff to recover, the jury must, in addition to these facts, find from a preponderance of the evidence that the failure of the defendant company to discharge the duty as alleged in the petition, was negligence on the part of the defendant company."

Again, he charged them, top of page 72, Record:

> "Or if you find that the defendant company in failing to have the cover over the ice bunker closed did cause the injury to the plaintiff, but fail to find from a preponderance of the evidence that the condition of the opening to the ice bunker in having the cover thrown back, was an act of negligence;"

That the plaintiff could not recover.

Again, on Record page 74, the Court charged the jury:

> "In other words, to enable the plaintiff to recover both propositions must appear from a preponderance of the evidence, viz: That the ice

bunker was uncovered and thereby caused the plaintiff to slip and fall, and that the condition of the ice bunker at the time of the injury was an act of negilgence on the part of the defendant."

If we should concede for the purpose of argument that the railroad company could adopt rules for the safe and proper handling of its fruit, and be relieved of liability for injury to its servants, so long as these rules were complied with, it by no means follows, that it would be relieved of liability if the rules were violated and an unusual and dangerous condition was caused by the negligence of the party in charge, and a condition created, which was unusual and not to be anticipated by the plaintiff, and other like employees.

The charges requested by the plaintiff in error, which the Court refused to give, and upon which the plaintiff in error relies for a reversal, amount in substance, to an instruction to the jury, that, no matter whether the rules were violated or not, no matter what the man in charge of the car did, and no matter how negligent he might have been, plaintiff could not recover because such party was in control of the car.

It will be noted that special charges numbers 3, 4, 5, 6, 7, 9, 12 and 16, ignored, altogether, the question of a compliance with the rules themselves. These charges also ignored, altogether, the question of negligence on the part

of the man in charge of the car and the resulting liability of the railroad company for his negligence. Take special charge number five as an illustration:

> "It appears from the evidence that the car of bananas was in control of the man, Marshall, at the time plaintiff was injured, therefore the railroad company is not responsible for the holes on top of the car being left open, you will find for the defendant."

It is clear that this charge would mean to the jury that no matter how the rules had been violated, and no matter to what extent Marshall, the man in charge of the car, might be negligent, still the railroad company would not be liable, it would have amounted, in substance, to a peremptory instruction in favor of the railway company, relieving it of all responsibility for the negligence of the man, Marshall, who was in charge of the car, or for its own negligence.

Again, the other special charges requested by the defendant, being numbers one, two, eight, ten, eleven, thirteen, fourteen, fifteen and seventeen, were covered by the main charge of the court, or in other words, the issues raised or presented by these mentioned instructions, at least such of them as were proper, were given to the jury in proper form by the Court in its main charge.

The Court charged fully upon the question of contributory negligence, upon the degree of care that the plaintiff himself must exercise for his own safety, and that

even though the ice hole was left open and caused the plaintiff to fall and receive his injuries, that the jury must go further and find that this was negligence, before the plaintiff could recover. On page 71 of the Record, the Court charges the jury:

> "Where a railroad company has on the occasion of an injury observed that degree of care which a person of ordinary prudence at that time and under those circumstances would have exercised, then it had fulfilled the measure of its duty and can not be held liable, in damages, and this though an employee may have been injured while in the discharge of his duty to the company."

Again, on the same page:

> "Whether the acts relied on by the plaintiff in this case constitute a failure to exercise ordinary care for his safety so as to make those acts negligence, and entitle him to recover is a question of fact for the jury."

Again, on page 74, he charges the jury:

> "In this particular case on the occasion of the injury to the plaintiff, it was the duty of the plaintiff to exercise ordinary care himself, to prevent his injury, and should the jury find from the testimony before them that on the occasion of the injury the plaintiff failed to exercise ordinary care for his own safety, and that such failure on his part contributed to cause the injury of which he complains, then such failure to exercise ordinary care on the part of the plaintiff would be what the law calls contributory negligence."

Again, on page 76 of the Record, the Court charged the jury:

> "Now you have it in evidence before you that the plaintiff was walking along the top of the car in proximity to the opening above the bunker. You also have it in evidence before you that the plaintiff, at the time, was carrying a lighted lantern in his hand, and it will be your duty to take into consideration these facts and all of the other facts in evidence which bear upon the question as to whether the plaintiff himself did or did not exercise ordinary care for his own safety. A man may not simply walk recklessly into danger and after doing so claim the right to be compensated to the full amount of his injuries under the law as it now stands. * * * * If you find from the evidence before you that the plaintiff, M. J. Murphy, by the exercise of ordinary care on his part, could have seen the opening in the car and thereby avoided injury to himself, and that he failed to exercise such ordinary care, and such failure on his part contributed to produce his injury, then he will not be barred from the right to recover absolutely, but the amount which you would otherwise find for him, must, under the law, be diminished in proportion to such negligence on his part attributable to him."

Again, on page 78 of the Record, the Court charges that the jury can:

> "Look to the fact of Marshall's control of the car, as well as the other facts in evidence, in determining whether the plaintiff was guilty of

contributory negligence in walking along the car in the manner he did and at the time of the injury."

It is worthy of notice in this case that the authorities cited by the plaintiff in error in its brief, are cases for damages to property or shipments of property, in none of which is there any reference to the duty of the master to his servant under such circumstances as in this case. Not a single authority is cited to sustain the proposition that the matter would not be liable for an injury to his servant, caused by the negligence of a party placed in charge or control of the place or appliances, which the master's servant was called upon to use in the performance of his work. The entire absence of any authority in the plaintiff in error's brief, in the United States Court of Appeals, considering the able counsel by whom it was prepared, is alone sufficient to justify the conclusion that no such authority exists. It is also worthy of notice that the railway company did not offer, or attempt to offer, any proof that it was proper, usual, or customary for the ventilators of ice holes to be thrown open as this was, and all the proof shows that it was very unusual and dangerous. The Alexander case, 103 Texas 597, being the only case cited by the plaintiff in error involving the liability of the master and servant, though not applicable to the case at bar, for the main reason that the condition that existed in that case was one that was usual and customary, and that the injured party was bound to anticipate and guard against,

and as to this condition, the Court says, in substance: "The witnesses, with one voice say, that the condition described was one usual on this and all other engines."

However, in studying the opinion, in the case, it becomes clear that had the condition of the engine been other than the usual and customary condition, that the decision would have been different, and we find, in that opinion, the Court says:

> "It is true that this court has never adopted that theory of the duty of the employer to his employees, which concedes to him the legal right to organize and conduct his business in his own way, however regardless it may be of their safety.'

The conclusion reached in the Alexander case can not be applied to the case at bar, for the reason that the servant was injured there as stated by the Court, by a condition of the engine, that was both usual and to be expected by the servant, in fact, by a condition that was shown to always exist on all engines, at practically all times and places.

This Court, in the case of Texas & Pacific vs. Archibald, 170 U. S. 665, lays the rule down succinctly that it is the duty of a railway company to use reasonable care to see that all cars employed on its road, those which it owns and those which it receives from other roads, are in good order and fit for the purpose for which they are intended, and that all employees of a railway company have a right

to rely upon this duty having been performed. In other words, the duty to exercise ordinary care to furnish a reasonably safe place and reasonable safe instrumentalities with which the work may be done, is an ever present, continuous, non-delegable duty.

On page 21 of its brief, in Circuit Court of Appeals, plaintiff in error attempts to give its version of the relative danger that would exist with the ventilator door fixed up by the ratchet and lever equipment, and on the other hand, having it thrown back on the roof of the car. Of course this was a question of fact for the jury, and this Court will not disturb their conclusions on this point, but to say the least of it, it would seem rather strange for the railroad company to provide these doors with ratchets and levers if the use of them made conditions more dangerous for its employees.

Again, the plaintiff in error, on page 21 and 22 of its brief, attempts to draw a conclusion that the plaintiff and two other switchmen were going on the refrigerator car for the purpose of getting bananas. Plaintiff in error's attorney says that he obtains this version from "reading between the lines" of the testimony, and certainly one would not only have to "read between the lines" but would have to insert between the lines of the record some testimony upon which to base any such conclusion. The testi-

mony shows that Murphy was performing his duty, that he had to be where he was at the time in the protection of the railway company's property.

We do not understand, that one may draw conclusions which there is positively no evidence to support. And the question of Murphy's being on the banana car, his purpose in being there, his duty there and all, are clearly established by the evidence in the case. And his rights and the railway company's right and liabilities under the circumstances were properly submitted to the jury by the Trial Court and their conclusion upon such matters will not ordinarily be disturbed, and certainly will not be disturbed by "reading between the lines."

We respectfully submit that the authorities as a whole, overwhelmingly show the plaintiff's right to recover in the case, and that there was no reversible error committed in the trial of this case. We further submit that no authorities of any character and no rules of law have been cited by the plaintiff in error to sustain its contention. And we respectfully pray that the judgment be affirmed.

S. P. JONES,
BIBB & SCOTT,
Attorneys for Defendant in Error, M. J. Murphy.

Messenger Print Marshall, Texas

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
M. J. MURPHY,
Defendant in Error.

No. 797

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR AND REQUEST TO AFFIRM WITH DAMAGES

S. P. Jones,
Marshall, Texas,
Attorney for Defendant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1914.

TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
M. J. MURPHY,
Defendant in Error.

No. 791

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR AND REQUEST TO AFFIRM WITH DAMAGES

GENERAL STATEMENT.

Writ of Error was prosecuted in this cause solely by reason of the fact that the law at the time same was filed, permitted the plaintiff in error to prosecute a Writ of Error to this court by reason of the fact that it was a corporation organized under the laws of the United States.

The record presents for decision no question concerning the interpretation of any of the laws of the

United States, and all the questions involve consideration of general laws, and the Writ of Error was sued out merely for delay; therefore, under Rule 23 (Southern Railway Company vs. Gadd, 232 U. S. 571), the judgment should be affirmed, with interest and damages.

On the first day of March, 1915, the defendant in error presented motion to affirm or dismiss, and the plaintiff in error presented a brief and argument in answer to said motion to affirm or dismiss, and the cause was placed upon the summary docket. The only proposition relied upon by the plaintiff in error in this Court, as I understand it, is that the Railway Company had the right to permit the person in charge of the shipment to have control of the ventilation of the car from which the defendant in error fell and was injured.

The correctness of this contention may be conceded in this case and still it is plain that the defendant in error was entitled to recover the judgment awarded him in the trial court. The right of the person in charge of the shipment to open the doors for the purpose of ventilating the car did not give him the right to convert it into a death trap by entirely removing the covering therefrom. The record clearly shows that the ice boxes were opened by elevating the doors by means of ratchets and lever, which

permitted full and complete ventilation and at the same time kept the hole protected so a man could not fall in it.

Marshall, the man in charge of the bananas in the car, and whose testimony was most favorable to the plaintiff in error, testified, Transcript of Record, page 63:

> "The doors are arranged with a kind of ratchet and lever to regulate the height to which they are raised, so that they can be opened and at the same time keep the hole protected so a man cannot fall in there. Lots of times we fasten them up while running on the road. When it is partially raised it affords a protection against anybody falling in the hole."

It is contended by the plaintiff in error that the trial court submitted for the determination of the jury the question of whether the railway company had the right to adopt rules permitting the person in charge of a shipment of fruit to control the manner of ventilating the car. An examination of the portion of the charge complained of shows that there is no merit in such contention. The undisputed evidence shows that the proper way to open the hatch to ventilate the car is by raising the door and fastening it in position by means of the ratchet device, which covers the opening (thereby protecting the trainmen) and at the same time "opens the hatch" for ventilation.

The effect of the portion of the court's charge complained of is to recognize the right of the railway com-

pany to leave Marshall (the owner of the fruit) in charge of the car and permit him to exercise his own judgment as to ventilating the car, but not to entirely relieve the railway company from liability for its negligence in permitting the man in charge of the car to entirely throw the covering or the door back on the car, making a man trap for the persons engaged in the dangerous service of switching cars in the yard.

Even if it is conceded that the railway company had the right to thus turn over to the person in charge of the car (a right that the trial court recognized in this particular case) the duty of caring for the shipment and ventilating the same, it does not follow that the non-delegable duty of furnishing the servant a reasonably safe place in which to perform his duties is thus nullified when the person intrusted with the appliances for ventilating the car improperly handles or uses the appliances provided therefor, thereby exposing the servant to risks and dangers not in contemplation of his employment.

It is respectfully submitted that the judgment of the trial court should be affirmed, and that the defendant in error should be awarded ten per cent damages in addition to legal interest upon the judgment.

S. P. JONES, Marshall, Texas.
Attorney for Defendant in Error.

TEXAS & PACIFIC RAILWAY COMPANY *v.* MURPHY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 791. Argued April 23, 1915.—Decided June 14, 1915.

Although the shipper may be in control of the car and may be negligent in regard thereto the carrier is not relieved of responsibility and so *held* that:

An employé of the carrier, not guilty of contributory negligence and not charged with notice of the carrier's rules in regard to refrigerator cars may, under the circumstances of this case, be liable for injuries caused by the doors of ice bunker being left open by the shipper in control of the car although the employé knew that the shipper was in such control.

THE facts, which involve the validity of a verdict and judgment for damages recovered by an employé of a carrier, are stated in the opinion.

Mr. F. H. Prendergast for plaintiff:

Where a car loaded with bananas was in charge of a custodian, and had been placed on a bulk track to be unloaded then the shipping rules of the railroad which permitted the custodian to open or close the ventilators to the car, are valid and the railroad would not be liable for an injury caused by the custodian having the ventilators open on top of the car. *Densmore Commission Co.* v. *Duluth R. R.*, 101 Wisconsin, 563; *Gillett* v. *Railroad*, 68 S. W. Rep. 61; *Railroad Co.* v. *Alexander*, 103 Texas, 597; *Schwartz* v. *Erie R. R.*, 106 S. W. Rep. 1188; *Tuttle* v. *Detroit &c. R. R.*, 122 U. S. 189; *Tex. Cent. R. R.* v. *Dorsey*, 30 Tex. App. 381.

The facts proven established the fact that defendant in error did not get on the car to set the brakes nor to perform any duty he owed the railroad, because he had gone five or six feet beyond the brake staff before he fell, and the special charges to that effect should have been given.

If the man in charge of the bananas left the opening on top of the car uncovered, then the railroad company would not be liable and the court erred in its charge to the jury. *Densmore* v. *Duluth R. R.*, 101 Wisconsin, 563; *Densmore* v. *Duluth R. R.*, 77 N. W. Rep. 904; *Gillett* v. *Railroad Co.*, 68 S. W. Rep. 61; *Schwartz* v. *Erie R. R.*, 106 S. W. Rep. 1188; *Tex. Cent. R. R.* v. *Dorsey*, 30 Tex. App. 381.

Mr. S. P. Jones for defendant in error:

The duty of the master to provide for his servant a reasonably safe place in which to work and reasonably safe instrumentalities is an ever present, non-delegable duty and when the same is delegated to another, he thereby becomes the agent or representative of the master for

whose negligence the master is responsible. *Cooper* v. *Robischung Bros.*, 155 S. W. Rep. 1050; *Hough* v. *Railway Co.*, 100 U. S. 213; *Railway Co.* v. *Baugh*, 149 U. S. 386; *Railway Co.* v. *Conway*, 98 S. W. Rep. 1070; *Railway Co.* v. *LaRue*, 27 C. C. A. 363; *Railway Co.* v. *Winton*, 66 S. W. Rep. 477; *Railway Co.* v. *Milam*, 58 S. W. Rep. 735; *Texas Traction Co.* v. *Morrow*, 145 S. W. Rep. 1069; *Toledo Brewing Co.* v. *Bosch*, 41 C. C. A. 482.

The rules relied upon by the Railway Company are not rules governing the switchman's work, but are for the railway agents at stations, conductors in charge of trains, and the messengers or men in charge of the fruit.

If the Railway Company could relieve itself of liability by delegating to the person in charge of the shipment the duty of handling the car, under the rules it would not relieve the company of liability in this case, as the rule providing for the opening of ventilators does not authorize them to be left unprotected, making a pitfall in the path of trainmen, but requires them to be protected by the cover with the ratchet device furnished for that purpose.

The rules do not contemplate that the cover shall be thrown back on the car roof and it is unusual and dangerous for them to be left in that position.

Switchmen have to move fast in doing their work. Defendant in error, a careful switchman, was at the place where it was necessary for him to be.

In support of these contentions, see *Baird* v. *Reilly*, 35 C. C. A. 78; *Cooper* v. *Robischung*, 154 S. W. Rep. 1052; *Grand Trunk Ry.* v. *Tennant*, 14 C. C. A. 190; 3 Labatt on Master and Servant, 1973; *Railway* v. *Baugh*, 149 U. S. 386; *Railway Co.* v. *Herbert*, 116 U. S. 647; *Railway Co.* v. *Peterson*, 162 U. S. 346.

Mr. Justice Pitney delivered the opinion of the court.

Murphy, while in the employ of the Railway Company as a switchman in its yards at Marshall, Texas, fell from a

refrigerator car and received personal injuries, for which he recovered a judgment against the Company in the United States District Court, which was affirmed by the Circuit Court of Appeals, without opinion. According to plaintiff's theory, supported by evidence sufficient to sustain the verdict, the car was standing upon one of the unloading tracks, but in such a position that it required to be occasionally moved in the course of switching operations. It was partially loaded with bananas, and it had at one end an ice bunker with an opening or scuttle in the roof of the car through which the bunker was filled. The opening was surrounded with a casing or coaming, rising somewhat above the surface of the roof, and there was a hinged door or cover fitted to the opening and furnished with a ratchet device for raising it and setting it at any desired angle. Plaintiff went upon the top of the car at night in the course of his duties in order to test the brake and if necessary to set it, so that the refrigerator car could not run down upon the main track. While walking upon the roof of the car and making ready to descend, it being dark, and the signal lantern that he carried furnishing scanty light upon his path, he stepped upon the casing or coaming of the ice bunker, his foot slipped or turned, and he fell to the ground, receiving serious injuries. The hatch cover, it appeared, was on this occasion left wide open, instead of being set at an angle by means of the ratchet, which, according to the evidence, was the proper mode of arranging it when it was desired to ventilate the ice bunker, and would have had the effect of preventing plaintiff from stepping upon the coaming.

Plaintiff's contention was that the Railway Company was negligent in leaving the door of the ice bunker wide open. Defendant insisted that the car was in the charge and control of one Marshall, who was selling bananas from it, and that under the rules prescribed by the company for governing the transportation of bananas Marshall had

a right to have the doors of the ice bunker open or closed, as he preferred. The trial court was requested to charge that the rules of the company governing the transportation of bananas in refrigerator cars were reasonable and binding upon the parties, and if the car in question was handled in accordance with those rules, and if the messenger in charge of the car left the ventilators open, and this caused the plaintiff to fall, he could not recover. This request was refused, and the court charged, on the contrary, that the Railway Company could not escape liability for injuring plaintiff by reason of Marshall's act in leaving the bunker opening uncovered; that the mere fact that Marshall, or somebody acting for him, left it uncovered would not be sufficient to defeat a recovery by the plaintiff; but that the jury could take into consideration the fact of Marshall's control of the car in determining whether the defendant company, on the occasion in question, was guilty of negligence directly or proximately contributing to plaintiff's injury, and also in determining whether plaintiff was guilty of contributory negligence in walking along the car in the manner he did at the time of his injury. We think this was sufficiently favorable to defendant. So far as appears, there was nothing to show that plaintiff had notice of the company's rules respecting the care of perishable freight in refrigerator cars, or that they entered into the contract of employment. Assuming he was charged with notice of Marshall's control of the car and knew that this must interfere to some extent with the Railway Company's care for plaintiff's safety, this was no more than a circumstance in the case, and could not properly be treated as conclusively showing want of responsibility on the part of defendant.

The other contentions of plaintiff in error are sufficiently answered by referring to *Texas & Pacific Ry.* v. *Rosborough*, 235 U. S. 429, and cases cited.

Judgment affirmed.